

## Chapter Eight

# PUNISHING THE WOMAN - SENTENCING WOMEN WHO KILL THEIR MALE PARTNERS

### 8.1 INTRODUCTION

In this chapter, I examine the approach of the judiciary in sentencing women who kill their violent partners. In Australia, as elsewhere, critical study of the judicial treatment of women who kill their male partners has centred on the gendered nature of the substantive criminal law and issues connected with the reception of evidence of BWS. While there has been extensive literature examining the operation of the sentencing discretion in the context of female offenders generally,<sup>1</sup> there has been comparatively little academic attention directed towards the sentencing of women who kill their male partners.<sup>2</sup> This

---

<sup>1</sup> See M Fox, 'Judicial Discretion and Gender Issues in Sentencing', in S Doran & J Jackson (eds), *The Judicial Role in Criminal Proceedings*, Oregon: Hart Publishing, 2000; P Carlen, 'Against the Politics of Sex Discrimination: For the Politics of Difference and a Woman-Wise Approach to Sentencing', in D Nicolson & L Bibbings (eds), *Feminist Perspectives on Criminal Law*, London: Cavendish Publishing Limited, 2000; S Edwards, *Women on Trial*, Manchester: Manchester University Press, 1984; A Morris, *Women, Crime and Criminal Justice*, New York: Basil Blackwell, 1987; M Eaton, 'Mitigating Circumstances: Familiar Rhetoric' (1983) 11 *International Journal of Sociology of Law* 385; K Daly, 'Rethinking Judicial Paternalism: Gender, Work, Family Relations and Sentencing' (1989) 3 *Gender and Society* 9; K Daly, *Gender, Crime & Punishment*, USA: Yale University Press, 1994; K Daly, 'Neither Conflict Nor Labelling Nor Paternalism Will Suffice: Intersections of Race, Ethnicity, Gender and Family in Criminal Court Decisions' (1989) 35 *Crime and Delinquency* 136; D Farrington & A Morris, 'Sex, Sentencing and Reconviction' (1983) 23 *British Journal of Criminology* 3; N Parisi, 'Are Females Treated Differently?', in N Rafter & E Stanko (eds), *Judge Lawyer Victim Thief Women, Gender Roles and Criminal Justice*, USA: Northeastern University Press, 1982; E Moulds, 'Chivalry and Paternalism: Disparities of Treatment in the Criminal Justice System', in S Datesman & F Scarpitti (eds), *Women, Crime and Justice*, New York: Oxford University Press, 1980; C Hedderman & L Gelsthorpe, *Understanding the Sentencing of Women*, London: Home Office Research Study, 1997; F Heidensohn, 'Gender and Crime', in M Maguire et al (eds), *Oxford Handbook of Criminology*, 2nd ed, Oxford: Clarendon Press, 1997.

<sup>2</sup> For Australian research in regard to sentencing in the context of domestic offences, see T Henning, 'Psychological Explanations in Sentencing Women in Tasmania' (1995) 28 *Australian and New Zealand Journal of Criminology* 298; K Warner, 'Sentencing for Rape', in P Eastaale (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture*, Sydney: Federation Press, 1998; K Warner, 'Sentencing the Violent Spouse' (1996) 3 *Psychiatry, Psychology and Law* 107; P Eastaale, 'Rape in Marriage: Has the Licence expired?', in P Eastaale (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture*, Sydney: Federation Press, 1998; P Eastaale, *Killing the Beloved: Homicide Between Adult Sexual Intimates*, Canberra: Australian Institute of

chapter aims to rectify this imbalance by considering the operation of the sentencing principles and practice in the context of battered women who kill.

The approach adopted in this chapter can be contrasted with much of the previous research that has considered the operation of the sentencing discretion in the context of female offenders. Existing research has tended to concentrate on assessing the chivalry thesis: whether women are treated more or less leniently than male offenders?<sup>3</sup> A related approach in the feminist literature has been to explain the disparity in sentences received by female and male offender in terms of the 'different circumstances in which men and women appeared before the court'.<sup>4</sup> In this thesis, my purpose is not to engage in the chivalry debate. My interest is not whether women are sentenced more leniently or harshly than men, but to further our understanding of the criminal justice system's response to women who kill their violent partners by focusing on the factors that account for the sentencing of female offenders who kill their violent male partners.

This chapter is divided into three main sections. First, as a preface to my analysis of sentencing comments, I provide an outline of the statutory framework that regulates the imposition of sentence for murder and manslaughter, and the legal principles that apply to the determination of the factual basis of sentencing. An outline of the sentencing range for domestic homicide in Australia is also

---

Criminology, 1993; H Donnelly et al, *Sentenced Homicides in New South Wales 1990 – 1993*, Sydney: Judicial Commission of New South Wales, 1995.

<sup>3</sup> M Fox, 'Judicial Discretion and Gender Issues', above n 1 at 327 – 328. See also P Carlen, above n 1 at 75 – 76. For a sample of literature that addresses the chivalry thesis, see S Edwards, *Women on Trial*, above n 1; I Armstrong, 'Women and their 'Uncontrollable Impulses': The Medicalisation of Women's Crime and Differential Gender Sentencing' (1999) 6 *Psychiatry, Psychology and Law* 67; A Morris, *Women, Crime and Criminal Justice*, above n 1; A Morris, 'Sex and Sentencing' [1988] *Criminal Law Review* 163; M Eaton, above n 1; K Daly, 'Rethinking Judicial Paternalism', above n 1; K Daly, *Gender, Crime & Punishment*, above n 1; K Daly, 'Neither Conflict Nor Labelling Nor Paternalism Will Suffice', above n 1; M Coombs, 'Crime and Punishment: Putting Women First' (1995) 93 *Michigan Law Review* 1686; C Kruttschnitt, 'Sex and Criminal Court Dispositions: The Unresolved Controversy' (1984) 21 *Research in Crime and Delinquency* 213; D Farrington & A Morris, above n 1; A Wilczynski, *Child Homicide*, Glasgow: Bell & Bain Ltd, 1997; R Douglas, 'Is Chivalry Dead? Gender and Sentence in the Victorian Magistrates' Courts' (1987) 23 *Australian and New Zealand Journal of Sociology* 343; N Parisi, 'Are Females Treated Differently?', in N Rafter & E Stanko (eds), *Judge Lawyer Victim Thief Women, Gender Roles and Criminal Justice*, USA: Northeastern University Press, 1982; E Moulds, above n 1; C Hedderman & L Gelsthorpe, above n 1; F Heidensohn, above n 1.

<sup>4</sup> See M Fox, 'Judicial Discretion and Gender Issues in Sentencing', *ibid* at 328 – 329.

provided which considers the sentencing range for male and female spousal homicide offenders.

In relation to this overview of sentencing range, I wish to stress two points. First, my research does not purport to be a detailed empirical study of the sentencing range for domestic homicide - murder and manslaughter – in each Australian jurisdiction. While recognising this limitation, the overview is used to provide a context for my discussion of the operation of the sentencing discretion in cases where women kill their male partners. Secondly, in considering the sentences imposed on male and female offenders, my intention is not to infringe my caveat in relation to the chivalry thesis. While the sentencing figures do appear to support the conclusion that some women are treated more leniently than some men at the sentencing stage, this chapter does not pursue this issue. Rather, this discussion contextualises my analysis of the operation of the sentencing discretion by providing a basis for my claim that some women are treated sympathetically.<sup>5</sup>

In the second section of this chapter, I analyse the operation of the sentencing discretion in cases where women kill their violent partners. Where there is discretion, the broad nature of the sentencing discretion means any analysis of sentencing comments is difficult due to the multitude of factors that influence the exercise of judicial discretion. Further, the interaction of the relevant factors and the judge's assessment of the offender and the offence mean that the same factors may be mentioned in different cases with disparate outcomes. Despite this diversity, my analysis suggests that the current approach to sentencing battered women who kill is premised on notions of mercy and sympathy. Mitigation is extended in terms of 'sympathy' and 'mercy' to women who can position themselves as an 'appropriate' victim. And while such an approach may produce desirable sentencing outcomes in the individual case, my concern is that the invocation of mercy as a means of affording sympathy has impeded the development of clear principles appropriate to sentencing for homicide in cases where women kill their violent partners.

---

<sup>5</sup> See Introduction at p 5.

In my analysis of sentencing comments, the relevance of an accused's Aboriginality as a factor relevant to the exercise of the sentencing discretion merits separate consideration. Although many of the cases involving Aboriginal women are examined elsewhere in the chapter, this section specifically analyses the representation of Aboriginal women who kill their male partners in the sentencing process. In particular, I examine how the intersectionality of race and gender impacts on the assessment of the accused's credibility in the exercise of the sentencing discretion.

In the final part of this chapter, I consider a more principled approach to sentencing battered women who kill based on the acknowledgement of the accused's motive for using fatal violence as a response to the history of violence inflicted by the deceased. This section also considers the impact of the mandatory sentencing regime for murder that exists in some Australian jurisdictions, and argues for the abolition of mandatory sentencing for murder.

## **8.2 THE SENTENCING FRAMEWORK FOR MURDER AND MANSLAUGHTER**

### **8.2.1 THE FACTUAL BASIS OF SENTENCING**

In exercising the sentencing discretion, a judge must determine the factual basis for the imposition of sentence that reflects the circumstances of both the offence and the offender.<sup>6</sup> In this process, rules exist that restrict the 'facts' to which the judge can properly have regard. These common law principles are summarised by Warner who observes that:

[There are] three kinds of factual circumstances that cannot be taken into account by sentencing judges. They are: any facts that have been negated by the verdict of the jury; any conduct that amounts to any other offence with which the offender has not been charged; and any matters of aggravation that might, and should, have been specially charged in the indictment if it is intended that those facts are to be taken into account against the offender.<sup>7</sup>

<sup>6</sup> See K Warner, *Sentencing in Tasmania*, 2nd ed, NSW: Federation Press, 2002 at 2.301.

<sup>7</sup> *Ibid* at 2.322. See *Bright* [1916] 2 KB 441 at 444 - 445 cited by Gibbs CJ in *De Simoni* (1981) 147 CLR 383 at 390.

A fundamental principle is that a judge is not entitled to sentence an accused on a basis inconsistent with a jury's verdict<sup>8</sup> or a plea.<sup>9</sup> There are also principles that regulate the procedure to be followed in sentencing hearings in relation to the onus and standard of proof about aggravating and mitigating factors.<sup>10</sup>

Although the factual implications arising from a plea of guilty or a verdict may often be clear, there are cases where the factual implications are ambiguous.<sup>11</sup> Ambiguity arises where the finding of guilt 'could be consistent with two or more hypotheses of fact to which differing degrees of moral culpability attach'.<sup>12</sup> For example, it may be difficult to ascertain the basis of the jury verdict of guilty or a plea to manslaughter in view of the several grounds on which such a verdict or plea could be based – provocation, lack of the requisite intent for murder, or diminished responsibility. In seeking to resolve the ambiguity, the judge can 'draw his or her own conclusions',<sup>13</sup> or less commonly, the trial judge can ask the jury questions in order to determine the basis of the verdict.<sup>14</sup> If the judge does not ask the jury the basis of the verdict of manslaughter, the sentencing judge should not attempt 'to determine the basis upon which the jury found the prisoner guilty of manslaughter'. Rather, the trial judge should 'find for himself or herself the facts material to sentencing, consistent with the jury's verdict of manslaughter'.<sup>15</sup> Similarly, in the case of a plea of guilty to manslaughter, the sentencing judge determines the grounds on which the plea is based in light of his or her interpretation of the facts of the case.<sup>16</sup>

---

<sup>8</sup> *Ibid* at 2.316. See *Webb* [1971] VR 147; *West* [1979] Tas R 1.

<sup>9</sup> *Chow* (1992) 28 NSWLR 593; *Olbrich* (1999) 199 CLR 272; *De Simoni* (1981) 147 CLR 383 at 389.

<sup>10</sup> See *Olbrich* (1999) 199 CLR 272. For a summary of the principles, see K Warner, *Sentencing in Tasmania*, above n 6 at 2.310.

<sup>11</sup> See R Fox & A Freiberg, *Sentencing State and Federal Law in Victoria*, 2nd ed, Melbourne: Oxford University Press, 1999 at 2.311 – 2.319.

<sup>12</sup> *Ibid* at 2.313.

<sup>13</sup> *Ibid* at 2.313.

<sup>14</sup> For a discussion of the use of jury questions, see *ibid* at 2.313 and K Warner, *Sentencing in Tasmania*, above n 6 at 2.320 – 2.321.

<sup>15</sup> *Isaacs* (1996) 41 NSWLR 374 at 380 per the Court.

<sup>16</sup> See R Fox & A Freiberg, above n 11 at 2.315 – 2.319.

## 8.2.2 THE SENTENCING DISCOUNT FOR A PLEA OF GUILTY

In all Australian jurisdictions, there is general acceptance that a plea of guilty is a factor in the mitigation of sentence.<sup>17</sup> The relevance of a guilty plea has been recognised by statute in most jurisdictions.<sup>18</sup> The traditional justification for the reduction of sentence following a guilty plea was its indication of remorse or contrition, or the desire to spare the victim the ordeal of a contested trial, especially sexual assault victims.<sup>19</sup> A more recent and controversial basis for the reduction in sentencing following a guilty plea is the utilitarian interest in administrative efficiency – the reduction in congestion of court lists and the reduction in the waste of limited resources (time and money).<sup>20</sup> The sentencing discount for a bare guilty plea is contentious. Warner has summarised the concerns as follows:

[It] penalise[s] those who plead not guilty, undermine[s] the principle that the defendant's plea must be made voluntarily, weaken[s] the requirement that the Crown prove its case beyond reasonable doubt, create[s] the risk that innocent people will plead guilty, militate[s] against public scrutiny of the performance of agents of criminal justice and has important implications for sentencing practice by introducing administrative convenience as a sentencing aim and what amounts to a principle of disparity in sentencing.<sup>21</sup>

Despite the controversy, the general position seems to be that a plea of guilty is mitigating per se as it furthers the goal of administrative convenience.<sup>22</sup>

<sup>17</sup> See R Fox & A Freiberg, *ibid* at 3.305; K Warner, *Sentencing in Tasmania*, above n 6 at 3.603 – 3.607; Thomson (2000) 49 NSWLR 383; K Mack & S Anleu, 'Sentence Discount for a Guilty Plea: Time for a New Look' (1995) 1 *Flinders Journal of Law Reform* 123; J Willis, 'New Wine in Old Bottles: The Sentencing Discount for Pleading Guilty' (1995) 13 *Law in Context* 39; *Laws of Australia*, CRIMINAL SENTENCING 12.2 at [150] – [161].

<sup>18</sup> *Crimes Act 1900* (ACT) s 429A(1)(u) – 'shall have regard'; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22 – 'must take ... into account and may accordingly impose a lesser penalty'; *Sentencing Act 1995* (NT) s 5(2)(j) – 'shall have regard'; *Penalties and Sentences Act 1992* (Qld) s 13 – 'must take ... into account and may reduce the sentence'; *Criminal Law (Sentencing) Act 1988* (SA) s 10(g) – 'should have regard'; *Sentencing Act 1991* (Vic) s 5(2)(e) – 'must have regard'; *Sentencing Act 1995* (WA) s 8(2) – 'is a mitigating factor and the earlier in proceedings that it is made, or indication is given that it will be made, the greater the mitigation'. The exception is Tasmania where there is no legislative provision.

<sup>19</sup> See K Mack & S Anleu, above n 17 at 123. See Thomson (2000) 49 NSWLR 383 at 412 per Spigelman CJ.

<sup>20</sup> See Thomson (2000) 49 NSWLR 383 at 411 – 417 per Spigelman CJ; K Mack & S Anleu, *ibid* at 124 – 131; K Warner, *Sentencing in Tasmania*, above n 6 at 3.605; J Willis, above n 17.

<sup>21</sup> *Ibid* at 3.605.

<sup>22</sup> K Warner, *Sentencing in Tasmania*, *ibid*; J Willis, *ibid* at 125 – 131; Thomson (2000) 49 NSWLR 383; *Law of Australia*, above n 17 at [150] – [161].

However, the mitigatory weight that attaches to a guilty plea will depend on the circumstances of the case.

It is difficult to quantify the precise discount attributable to the guilty plea. In some jurisdictions, authority states that the discount should be quantified, while in other jurisdictions, there is authority to the opposite effect.<sup>23</sup> There has been scepticism expressed as to whether the discount actually operates in practice.<sup>24</sup> However, general principle dictates that if the plea is entered as an acceptance of the inevitability of conviction, then there is little or no discount.<sup>25</sup> Conversely, as Mack and Anleu comment:

It is only the accused who has something to give up (that is, the possibility of acquittal) who will receive a substantial discount and for whom the inducement of a reduced sentence may actually be effective in bringing about a guilty plea.<sup>26</sup>

This concern directly relates to the situation of battered women who kill, as they have something significant to give up – self-defence and the possibility of an acquittal. This is reflected in the case of *Varagnolo*, where McInerney J took into account the accused's plea of guilty at the first available opportunity. In particular, that the accused had given up her defence of self-defence: 'a jury in the circumstances of this case could well have acquitted the prisoner on the grounds of self-defence and thus the plea must be regarded as substantial

---

<sup>23</sup> In NSW (*Thomson* (2000) 49 NSWLR 383) and South Australia (*Sutherland*, unreported, CAC SA, 16 Nov 1992; *Harris and Simmonds* (1992) 59 SASR 300) there is support for the proposition that the discount should be quantified. In Tasmania (*Pavlic* (1995) 5 Tas R 186) and Victoria (*O'Brien* (1991) 55 A Crim R 410; *Nagy* [1992] 1 VR 637) the weight of authority is that the discount should not be quantified. In Queensland, the position is unclear. In *Harman* [1989] 1 Qd R 414, it was held that it was inappropriate to identify discounts. However, in *Corrigan* [1994] 2 Qd R 415, decided after the introduction of s 13 of the *Penalties and Sentences Act 1992* (Qld), Macrossan CJ and Lee J stated that 'it is obviously desirable for a sentencing court to state specifically how it is reducing a sentence when it purports to do so' at 416. It is unclear the extent to which *Corrigan* qualifies the earlier comments in *Harman*, see *Thomson* (2000) 49 NSWLR 383 at 405 – 406 per Spigelman CJ. In Western Australia, it appears that the discretion rests with the judge as to whether to quantify the discount, see *Verschuren* (1996) 17 WAR 467. See further: *Laws of Australia*, above n 17.

<sup>24</sup> See K Mack & S Anleu, above n 17 at 129. In *Thomson* (2000) 49 NSWLR 383, the scepticism as to whether there was a sentencing discount in practice was one of the reasons why the court considered that a guideline judgment was appropriate. The scepticism also accounted for the court requiring in the guideline judgment that judges should explicitly state that the plea had been taken into account and should quantify the effect of the plea on the sentence in so far as they believe it appropriate to do so.

<sup>25</sup> See K Warner, above n 6 at 3.606.

<sup>26</sup> K Mack & S Anleu, above n 17 at 136.

evidence of contrition'.<sup>27</sup> The accused's sentence was a recognisance where she was released on a bond to be of good behaviour.

Cases where battered women plead guilty to manslaughter provide a concrete example of the concerns expressed by those who have advocated the abolition of the sentence discount.<sup>28</sup> The potential for injustice arises given that the impact of the discount is most significant in uncertain cases, that is where there is an arguable defence. As Mack and Anleu write, '[t]hese are the very cases where justice is best served by having a trial'.<sup>29</sup> In the context of battered women who kill, my contention has been that some battered women are pleading guilty to manslaughter in circumstances where there appears to be evidence that would provide a basis for self-defence.<sup>30</sup> In my argument, there is a real concern that the existence of the sentencing discount encourages innocent women to plead guilty to manslaughter. The sentencing discount is a further factor that may tilt the balance in favour of a plea when viewed against the difficulties of the trial and the riskiness of self-defence as a strategy.<sup>31</sup> In other words, the existence of the sentencing discount is another factor that makes the plea of guilty an attractive alternative to relying on self-defence at trial.

### **8.2.3 SENTENCING FOR MURDER AND MANSLAUGHTER: STATUTORY MAXIMUM PENALTIES**

In all Australian jurisdictions, the maximum penalty for murder is life imprisonment.<sup>32</sup> However, a distinction can be drawn between those jurisdictions where the penalty is mandatory and those jurisdictions where the trial judge retains discretion as to the imposition of life imprisonment. Life imprisonment is mandatory in Queensland,<sup>33</sup> Western Australia,<sup>34</sup> South Australia,<sup>35</sup> and the

---

<sup>27</sup> Unreported, SC NSW, 21 Mar 1996 at 25.

<sup>28</sup> K Mack & S Anleu, above n 17.

<sup>29</sup> *Ibid* at 141.

<sup>30</sup> See 4.4.3 and 6.2.

<sup>31</sup> See Chapter Six.

<sup>32</sup> *Crimes Act 1900* (ACT) s 12(2); *Crimes Act 1900* (NSW) s 19A; *Criminal Code* (NT) s 164; *Criminal Code* (Qld) s 305; *Criminal Law Consolidation Act 1935* (SA) s 11; *Criminal Code* (Tas) s 158; *Crimes Act 1958* (Vic) s 3; *Criminal Code* (WA) s 282.

<sup>33</sup> *Criminal Code* (Qld) s 305(1).



Northern Territory.<sup>36</sup> In contrast, in New South Wales,<sup>37</sup> the Australian Capital Territory,<sup>38</sup> Victoria<sup>39</sup> and Tasmania<sup>40</sup> the imposition of life imprisonment is discretionary.

The punishment for manslaughter is discretionary in all jurisdictions, with the maximum penalty varying between jurisdictions. In Queensland,<sup>41</sup> South Australia<sup>42</sup> and the Northern Territory,<sup>43</sup> the maximum penalty for manslaughter is life imprisonment. The maximum penalty for manslaughter is imprisonment for 25 years in New South Wales;<sup>44</sup> 21 years in Tasmania;<sup>45</sup> and 20 years in Victoria,<sup>46</sup> the Australian Capital Territory<sup>47</sup> and Western Australia.<sup>48</sup>

#### 8.2.4 THE SENTENCING RANGE FOR DOMESTIC HOMICIDE

Where there is discretion, although the 'sentencing discretion is reasonably broad, it is not completely unfettered'.<sup>49</sup> The sentence imposed must be proportionate to the objective circumstances of the offence.<sup>50</sup> While there is some uncertainty as to how the 'objective circumstances' of an offence are constituted, it appears that it includes: the ingredients of the offence; the degree of harm; and the method of carrying out the offence.<sup>51</sup> In sentencing for murder, where

---

<sup>34</sup> *Criminal Code* (WA) s 282. A distinction is drawn between wilful murder where the penalty is expressed to be a 'mandatory punishment of (i) strict security life imprisonment; or (ii) life imprisonment, and murder where the penalty is mandatory life imprisonment.

<sup>35</sup> *Criminal Law Consolidation Act 1935* (SA) s 11.

<sup>36</sup> *Criminal Code* (NT) s 164.

<sup>37</sup> *Crimes Act 1900* (NSW) s 19A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21.

<sup>38</sup> *Crimes Act 1900* (ACT) ss 12(2), 442.

<sup>39</sup> *Crimes Act 1958* (Vic) s 3.

<sup>40</sup> *Criminal Code* (Tas) s 158.

<sup>41</sup> *Criminal Code* (Qld) s 310.

<sup>42</sup> *Criminal Law Consolidation Act 1935* (SA) s 13.

<sup>43</sup> *Criminal Code* (NT) s 167.

<sup>44</sup> *Crimes Act 1900* (NSW) s 24.

<sup>45</sup> *Criminal Code* (Tas) s 389(3).

<sup>46</sup> *Crimes Act 1958* (Vic) s 5.

<sup>47</sup> *Crimes Act 1900* (ACT) s 15(2).

<sup>48</sup> *Criminal Code* (WA) s 287.

<sup>49</sup> S Casey & J Wilson, 'Discretion, Disparity or Discrepancy? A Review of Sentencing Consistency' (1998) 5 *Psychiatry, Psychology and Law* 237 at 238.

<sup>50</sup> Hoare (1989) 167 CLR 348.

<sup>51</sup> See discussion in K Warner, *Sentencing in Tasmania*, above n 6 at 3.303 – 3.307; R Fox & A Freiberg, above n 11 at 3.506 – 3.509; R Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489.

discretionary sentencing exists,<sup>52</sup> and for manslaughter, (as with other offences) the exercise of the sentencing discretion is dependent on judicial assessment of the nature or gravity of the offence, as well as details relating to the offender.<sup>53</sup>

The sentences imposed in the homicide cases identified in my research involving male and female offenders who killed their partner between 1980 and 2000 are detailed in the Appendix. While this enables a broad comparison of the penalties imposed in Australian jurisdictions to be undertaken, it does not purport to be a detailed empirical sentencing study.<sup>54</sup> Further, in view of the small number of cases involved, any analysis of the range of sentences imposed is limited. This particularly applies in the context of female offenders, and particularly those convicted of murder. In reading these sentence ranges, it is also important to bear in mind that comparisons between jurisdictions in terms of the actual sentence imposed is problematic, as sentencing regimes and practices differ between jurisdictions. There have also been statutory changes to the sentencing regimes in some jurisdictions.<sup>55</sup>

#### 8.2.4.1 *Murder*

The offence of murder is regarded as a very serious offence deserving of a significant penalty. This is reflected in my research where a custodial sentence was imposed in all of the murder cases identified (86 men and 7 women).<sup>56</sup>

##### Female offenders

In jurisdictions where discretionary sentencing for murder exists and where a term of years was imposed,<sup>57</sup> the median head sentence was 12 years and 8 months for female spousal homicide offenders. In these jurisdictions, the highest sentence imposed on a female offender in respect of killing her male partner was

---

<sup>52</sup> See 8.2.3.

<sup>53</sup> See R Fox & A Freiberg, above n 11 at 2.301 and Chapter 3; K Warner, *Sentencing in Tasmania*, above n 6 Chapter 3.

<sup>54</sup> For examples of empirical studies, see *ibid.*

<sup>55</sup> See below n 66.

<sup>56</sup> See Appendix.

<sup>57</sup> As explained at 8.2.3, life imprisonment remains a sentencing option for a murder conviction.

life imprisonment. This was imposed in *Merritt*<sup>58</sup> where the accused was sentenced according to section 19 *Crimes Act 1900* (NSW) (now repealed).<sup>59</sup> This provided that the penalty for murder was mandatory life imprisonment, unless it was demonstrated that the accused's culpability for the murder was significantly diminished by mitigating circumstances. The accused appealed her life sentence on the grounds that her husband's prior violence and conduct towards her constituted such mitigating circumstances. The New South Wales Court of Criminal Appeal rejected the accused's submission, and accepted the sentencing judge's assessment of the killing as cold, calculating and cunningly conceived'.<sup>60</sup>

The lowest penalty imposed for murder on a female offender was in the case of *Burke*, where a head sentence of nine years with a minimum term of five years was imposed. In this case, the accused stabbed her defacto partner in their vehicle (which was also their living accommodation). The accused was an Aboriginal from a deprived social background.<sup>61</sup> James J observed that:

The prisoner's personal history reveals a history of unrelenting tribulation and harshness which is most difficult for most people to comprehend. She is a person who existed in socially deprived circumstances ... consigned to a lifestyle of poverty, deprivation and entrenched alcohol abuse in an atmosphere where she is the subject of violence and conditioned to violence as a social response.<sup>62</sup>

The accused had been drinking heavily on the night of the stabbing, and it was accepted that her actions were not premeditated – rather 'on the spur of the moment during the heat of some dispute, real or imagined on her part'.<sup>63</sup> In view of her intoxication, her intellectual disabilities and her personal circumstances, James J viewed the offence as one for which the punishment 'should [not] be

---

<sup>58</sup> Unreported, CCA NSW, 2 Jun 1988.

<sup>59</sup> This provision was inserted by *Crimes (Homicide) Amendment Act 1982* (NSW) and replaced by s 19A contained in *Crimes (Life Sentences) Act 1989* (NSW) on 12 January 1990.

<sup>60</sup> Unreported, CCA NSW, 2 Jun 1988 at 7 per Finlay J.

<sup>61</sup> See also 8.3.5 for a discussion of Aboriginality as a factor in the sentencing discretion.

<sup>62</sup> [2000] NSWSC 356 at [43].

<sup>63</sup> [2000] NSWSC 356 at [31].

greatly in excess of that which would have been expected had she been found guilty of the crime of manslaughter'.<sup>64</sup>

### Male offenders

In those jurisdictions where discretionary sentencing for murder exists and where a term of years was imposed,<sup>65</sup> the median head sentence was 18 years and 10 months for male spousal homicide offenders. Since the introduction of discretionary sentencing for murder in these jurisdictions,<sup>66</sup> the penalty of life imprisonment has been imposed in 13 cases of spousal homicide involving male offenders. In New South Wales, since the introduction of section 19A *Crimes Act 1900* (NSW) on 12 January 1990, which provided that imprisonment for life means natural life (reserved for the 'worst category of case'), there have been three cases of spousal homicide where this penalty has been imposed.<sup>67</sup> The highest determinate sentence imposed on a male offender convicted of murder in respect of killing his female partner was a head sentence of 30 years with a

<sup>64</sup> [2000] NSWSC 356 at [59].

<sup>65</sup> As explained at 8.2.3, life imprisonment remains a sentencing option for a murder conviction.

<sup>66</sup> In Victoria, the mandatory life penalty for murder was abolished in 1986. Those sentenced to life imprisonment before 1986 could apply to the Supreme Court to have a non-parole period fixed under initially the *Penalties and Sentences Act 1985* (Vic) s 18A and later the *Sentencing Act 1991* (Vic) s 13. See further, discussion in R Fox & A Freiberg, above n 11 at 12.201. In New South Wales, mandatory life imprisonment was the penalty for murder until 1982. In 1982, section 19 of the *Crimes Act 1900* (NSW) was amended by *Crimes (Homicide) Amendment Act 1982* (NSW) which removed the mandatory life penalty and conferred a limited discretion to impose a sentence other than life where 'it appear[ed] to the Judge that the person's culpability [was] significantly diminished by mitigating factors'. Section 19 *Crimes Act 1900* (NSW) was replaced by sections 19A and 442 *Crimes Act 1900* (NSW) inserted by *Crimes (Life Sentences) Act 1989* (NSW). These provided for discretionary sentencing for murder, however if a life penalty was imposed, this meant imprisonment for 'natural life'. There has been a subsequent legislative amendment in the *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW). The sentencing discretion for murder in New South Wales now is found in *Crimes Act 1900* (NSW) 19A and *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21. Section 19A(2) *Crimes Act 1900* (NSW) still provides that life means 'natural life'. In Tasmania, discretionary sentencing for murder was introduced by the *Criminal Code Amendment (Life Prisoners and Dangerous Criminal) Act 1994* (Tas) s 4.

<sup>67</sup> Section 19A *Crimes Act 1900* (NSW). The cases are: *Baker*, unreported, CCA NSW, 20 Sept 1995 – killed 6 people (including his wife) and wounded 1 other; *Street*, unreported, SC NSW, 29 Jul 1995 – killed two women within 12 weeks of each other; *Herring*, unreported, SC NSW, 3 Oct 1991 – motivated by money. In all three cases, there were no mitigating circumstances identified. See discussion of 'worst category of case' in *Twala*, unreported, CCA NSW, 4 Nov 1994 at 6 per Badgery-Parker J and in *Veen (No 2)* (1988) 164 CLR 465 at 478 per Mason CJ, Brennan, Dawson & Toohey JJ.

minimum term of 20 years.<sup>68</sup> The lowest sentence imposed was a head sentence of 14 years with a minimum term of 10 1/2 years.<sup>69</sup>

#### 8.2.4.2 *Manslaughter*

The courts have consistently recognised that sentencing for manslaughter is not an easy task and that there exists a wide range of sentences available in relation to manslaughter.<sup>70</sup> The diversity of circumstances in which manslaughter can be committed is reflected in the wide range of sentences imposed from a lengthy period of imprisonment to a non-custodial sentence. The maximum penalty identified for a female offender convicted of manslaughter in respect of killing her male partner was a head sentence of twelve years with a minimum term of eight years.<sup>71</sup> The maximum penalty imposed for a male offender was a head sentence of twelve years with a minimum term of nine years.<sup>72</sup> These were both cases decided in New South Wales where murder had been reduced to manslaughter on the grounds of diminished responsibility.

The minimum penalty imposed in cases of manslaughter for both male and female offenders was a non-custodial sentence (recognisance, suspended sentence or probation). Non-custodial sentences were imposed on 2 of the 54 male offenders convicted of manslaughter (4%) and 16 of the 55 female offenders convicted of manslaughter (29%). In relation to female offenders, non-custodial sentences were imposed in 6 cases where provocation was the basis of the manslaughter conviction<sup>73</sup> and in 10 cases where the basis of the

<sup>68</sup> *Barac* [1999] NSWSC 61.

<sup>69</sup> *Audsley*, unreported, SC NSW, 30 May 1997.

<sup>70</sup> In *Hill* (1981) 3 A Crim R 397, where Street CJ commented that the circumstances leading to the felonious taking of human life being regarded as manslaughter rather than murder can vary infinitely, and it is not always easy to determine in any given case what should be done in the matter of sentence', at 402. See also *Papazisis and Bird* (1991) 51 A Crim R 242 at 245 per Young CJ, Brooking and Marks JJ.

<sup>71</sup> *Troja*, unreported, CCA NSW, 16 Jul 1991.

<sup>72</sup> *Bourke* [2000] NSWSC 356.

<sup>73</sup> Recognisance: *Gardner*, unreported, SC NSW, 27 Mar 1992. Suspended sentence: *Bradley*, unreported, SC Vic, 14 Dec 1994; *Denney* [2000] VSC 323; *M*, unreported, SC SA, 31 Jan 1986; *Taylor*, unreported, SC SA, 16 Jun 1993. Probation and community service: *Gilbert*, unreported, SC WA, 4 Nov 1993.

manslaughter conviction was lack of the requisite intent for murder.<sup>74</sup> In contrast, in both of the cases where a non-custodial sentence was imposed on male offenders, diminished responsibility was the basis of the manslaughter conviction.<sup>75</sup>

Although there is little difference in the treatment of male and female spousal homicide offenders convicted of manslaughter in terms of the highest and lowest penalties imposed, my findings indicate that women appear generally to be sentenced to lesser sentences than men. Table 8.1 shows that the median head sentence imposed for manslaughter on a female offender was three years and ten months. In contrast, the median head sentence imposed for manslaughter on a male offender was seven years and three months.

**Table 8.1** Median head sentence: manslaughter in relation to killing partner<sup>76</sup>

	MALE OFFENDERS		FEMALE OFFENDERS	
	No.	Years	No	Years
Provocation	15	6 & 11 mths	22	3 & 9 mths
Intent	24	6 & 7 mths	31	3 & 6 mths
Diminished Responsibility	15	8 & 8 mths	2	8 & 6 mths
Total	54	7 & 3 mths	55	3 & 10 mths

<sup>74</sup> Recognisance: *Varagnolo*, unreported, SC NSW, 21 Mar 1996; *Woolsey*, unreported, SC NSW, 19 Aug 1993; *Kennedy* [2000] NSWSC 109; *Kennedy*, unreported, SC NSW, 20 Jun 1998; *Roberts*, unreported, SC NSW, 1 Aug 1989; *Bogunovich* (1985) 16 A Crim R 456. Suspended sentence: *Billeley*, unreported, SC SA, 31 Jul 1987; *Brauer*, unreported, SC SA, 16 Feb 1988; *Nichols*, unreported, SC Tas, 15 Dec 1986; *Rogers*, unreported, SC Vic, 11 Dec 1995. See discussion of the 'exceptional' case where a non-custodial sentence is considered appropriate at 8.3.3.

<sup>75</sup> Recognisance: *Jans* [2000] NSWSC 525 (diminished responsibility); *Bateman* [2000] NSWSC 867.

<sup>76</sup> The median head sentence is calculated by including non-custodial sentences as '0'. A non-custodial sentence includes a suspended sentence, a recognisance or a good behaviour bond.

### 8.3 JUDICIAL DISCRETION IN SENTENCING WOMEN WHO KILL THEIR MALE PARTNERS

#### 8.3.1 UNDER THE CLOAK OF MERCY

##### 8.3.1.1 *Justice and Mercy*

The relationship between justice and mercy was a dominant theme that emerged in my reading of the sentencing comments in cases where women had been convicted of manslaughter in respect of killing their violent partner. Courts have traditionally recognised that mercy can be a factor relevant to the exercise of the sentencing discretion as ‘justice and humanity walk together’.<sup>77</sup> As Windeyer J stated in *Cobiac v Liddy*, ‘[t]he whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy’.<sup>78</sup> However, courts have been concerned to place limits on mercy as a factor relevant to the imposition of punishment. It has been stressed that judges must not be ‘weakly merciful’ and that ‘mercy must be exercised upon considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well-balanced judgment’.<sup>79</sup> While there has been judicial acceptance of mercy’s relevance to the sentencing process, its role remains vague and unsettled. As Fox has commented, references to mercy in the sentencing process open a Pandora’s Box revealing ‘the paradoxical place of mercy at the judgment seat’.<sup>80</sup>

Writers have identified and problematised the relationship between mercy and justice. There has been debate as to the precise nature of mercy, and whether there is place for ‘mercy’ in the sentencing process.<sup>81</sup> There has been discussion

<sup>77</sup> *Kane* [1974] VR 759 at 766 per the Court.

<sup>78</sup> (1969) 119 CLR 257 at 331. In *Miceli* [1998] 4 VR 588, where Tadgell JA stated that ‘it cannot be doubted that an element of mercy has always been regarded, and properly regarded, as running hand in hand with the sentencing discretion’, at 592.

<sup>79</sup> *Kane* [1974] VR 759 at 765, 766 per the Court.

<sup>80</sup> R Fox, ‘When Justice Sheds a Tear: the Place of Mercy in Sentencing’ (1999) 25 *Monash University Law Review* 1 at 1.

<sup>81</sup> See for example: *ibid*; H Hestevold, ‘Justice to Mercy’ (1985) 46 *Philosophical and Phenomenological Research* 281; A Smart, ‘Mercy’ (1968) 43 *Philosophy* 345; E Muller, ‘The Virtue of Mercy in Criminal Sentencing’ (1993) 24 *Seton Hall Law Review* 288; N Brett, ‘Mercy and Criminal Justice: a Plea for Mercy’ (1992) 5 *Canadian Journal of Law and Jurisprudence*

as to how, if at all, mercy differs from 'just deserts', that is the imposition of a penalty that reflects the moral culpability of the offender and the seriousness of the offence. It has been argued that if the sentence imposed reflects the circumstances of the offender and the offence, then although some courts have referred to this as the dispensation of 'mercy', this is a misnomer.<sup>82</sup> It has been argued that this is really a situation of mitigation, that is, the 'punishment which would normally be regarded as commensurate to the gravity of the crime ... [is] alleviated by reference to factors personal to the offender and circumstances'.<sup>83</sup> If utilised in this way, mercy's function is inside the standard sentencing framework. It is 'a discretionary feature of the sentencing system which can be activated in determining what *weight* to be attributed to an established mitigating factor in arriving at the ultimate sentence'.<sup>84</sup> While the concept of mercy may assist in determining the appropriate sentence to be imposed in a particular case from the acceptable range of sentences, in this sense it is not an independently operating doctrine.<sup>85</sup>

The issue remains whether mercy has any independent role to play 'outside the main framework of sentencing'.<sup>86</sup> Is there such a thing as 'pure' or genuine mercy? A number of commentators have argued that there is room for mercy,

---

81; J Murphy, 'Mercy and Legal Justice', in J Murphy & J Hampton (eds), *Forgiveness and Mercy*, Cambridge: Cambridge University Press, 1988; N Simmonds, 'Judgment and Mercy' (1993) 13 *Oxford Journal of Legal Studies* 52; J Dressler, 'Hating Criminals: How can Something that feels so good be wrong?' (1990) 88 *Michigan Law Review* 1448; A Brien, 'Mercy within Legal Justice' (1998) 24 *Social Theory and Practice* 83; R Misner, 'A Strategy for Mercy' (2000) 41 *William and Mary Law Review* 1303; N Walker, 'The Quiddity of Mercy' (1995) 70 *Philosophy* 27; N Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice*, London: Blackstone Press, 1999.

<sup>82</sup> See Fox who stated that 'although the court uses the term in explaining how the penalty was arrived at, the reason given readily falls within an established ground of mitigation. The court has properly taken into account some legally and morally relevant feature of the situation which arguably renders some reduction obligatory. This is better understood as a principled act of mitigation, rather than a pure act of mercy', R Fox, 'When Justice Sheds a Tear', *ibid* at 10. See also H Hestevold, above n 81 at 282.

<sup>83</sup> R Fox, 'When Justice Sheds a Tear', *ibid* at 9.

<sup>84</sup> *Ibid* at 11.

<sup>85</sup> *Ibid*. See Hicks (1987) 45 SASR 270.

<sup>86</sup> *Ibid*.



separate from the usual grounds of mitigation.<sup>87</sup> For example, Fox has described the independent doctrine of mercy in the following terms:

The true privilege of mercy is to be found in the residual discretion vested in each sentencer which allows a downward departure from the principle of proportionality outside the principles of mitigation. It can be utilised in exceptional circumstances to allow weight to be given to factors which are ordinarily not regarded as relevant mitigating considerations.<sup>88</sup>

Commentators, who have argued that there is an independent doctrine of mercy operating within the sentencing discretion, have pursued the related need to isolate the circumstances that may amount to the exercise of 'pure' or 'genuine' or 'true' mercy.<sup>89</sup> Further, there have been attempts made to identify the principles (if any) that guide its use.<sup>90</sup>

The distinction between the role of 'pure' mercy and the principles of mitigation has been perplexing and obscure. In the Victorian Sentencing Committee's consideration of coherent principles for sentencing, set out in its 1988 report, the relevance of mercy to the sentencing process was recognised.<sup>91</sup> The Committee considered that an example of the use of mercy in the sentencing discretion would be when a battered woman was convicted of manslaughter, and received a bond rather than a term of imprisonment.<sup>92</sup> This was a specific example of the broader principle that mercy may be appropriate in the exercise of the sentencing discretion when:

---

<sup>87</sup> See *ibid* (generally); A Smart, above n 81; J Dressler, above n 81; N Brett above n 81; A Brien, above n 81; N Walker, *Aggravation, Mitigation and Mercy*, above n 81 at 227; E Muller, above n 81 at 302. Cf J Murphy, above n 81; P Twambley, 'Mercy and Forgiveness' (1976) 36 *Analysis* 84; R Harrison, 'The Equality of Mercy', in H Gross & R Harrison (eds), *Jurisprudence: Cambridge Studies*, Oxford: Clarendon Press, 1992.

<sup>88</sup> R Fox, 'When Justice Sheds a Tear', *ibid* at 13.

<sup>89</sup> See for example: *ibid* (generally); A Smart, above n 81; N Walker, *Aggravation, Mitigation and Mercy*, above n 81.

<sup>90</sup> See R Fox, 'When Justice Sheds a Tear', *ibid* at 23 – 26; N Walker, 'The Quiddity of Mercy', above n 81; N Walker, *Aggravation, Mitigation and Mercy*, *ibid* at 225 – 226.

<sup>91</sup> See Victorian Sentencing Committee, *Sentencing*, vol 1, Melbourne: Victorian Attorney-General's Department, 1988 at para 3.14.10.

<sup>92</sup> *Ibid* at para 3.3.2.

An offence is intrinsically less evil than another, where a person acts under provocation, and where there are extenuating circumstances ... It is sometimes appropriate where the offender has already suffered a great deal.<sup>93</sup>

However, Fox has argued that this example highlights the 'difficulty of unpicking the relationship between the various manifestations of mercy and the concept of mitigation'.<sup>94</sup> The leniency afforded when an offence is intrinsically less evil is readily 'fitted within the framework of existing general principles of proportionality and mitigation'.<sup>95</sup> It was not then an example of the operation of 'true' and independent mercy.

### 8.3.1.2 *Mercy and battered women who kill*

In cases where women kill their violent partners, my contention is that the judicial approach to sentencing reveals a tendency to view leniency for battered women as dependent upon a judge exercising 'mercy'. Although the debate as to whether the judicial approach is an example of 'true' mercy properly called or whether it is a reflection of the operation of mercy within the main framework of sentencing (in the evaluation of mitigating factors) may be interesting at a theoretical level, my argument is that the judge's approach to the exercise of the sentencing discretion is the significant issue. It is what judges think that they are doing that counts. And my analysis suggests that judges perceive that they are being merciful by the imposition of a lenient sentence – whether it is true mercy or not.

In my argument, there are two features of the judicial approach to sentencing battered women that support my assertion that, from the judge's point of view, the imposition of sentence is directed from the perspective of 'mercy' rather than

---

<sup>93</sup> *Ibid* citing A Smart, 'Mercy', in H Acton (ed), *The Philosophy of Punishment: A Collection of Papers*, London: Macmillan, 1969 at 216. See also J Krause, 'Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women who Kill' (1994) 46 *Florida Law Review* 699 who observes that 'it seems likely that prior suffering may be considered in deciding whether women have 'suffered enough' to merit reductions in sentences', at 763.

<sup>94</sup> R Fox, 'When Justice Sheds a Tear', above n 80 at 13.

<sup>95</sup> *Ibid* at 14. It is also recognised by Smart: A Smart, above n 81 at 349, 358. Although the aspect of leniency afforded by the offender having already suffered a great deal is set out as a case of genuine mercy by Walker. Walker states that 'the notion of 'natural punishment' – the consideration that the offender 'has suffered enough' is a 'candidate for the status of genuine mercy', N Walker, *Aggravation, Mitigation and Mercy*, above n 81 at 227.

'mitigation'. First, the existence of compassion and sympathy as the main motives for the exercise of the sentencing discretion have been identified as features that distinguish mercy from mitigation.<sup>96</sup> In the context of battered women who kill, in some cases the exercise of the sentencing discretion is clearly motivated by notions of sympathy and compassion, and so akin to mercy rather than mitigation. For example, in *Kennedy*, the accused stabbed her violent husband and her plea of guilty to manslaughter was accepted on the basis that she lacked the requisite intent for murder. In imposing sentence, James J commented that:

The taking of a life is a dreadful crime but can be the result of human tragedy. However, a humanitarian approach requires caution, and sympathy for the offender must be evaluated along with all the demands of criminal justice. Typical of this approach is a case where the ill-treated woman has killed her tormentor. ...

Such circumstances as have been proved here excite sympathy and compassion. They incline a court to mercy, but the exercise of mercy must be tempered with well-balanced judgment. In *Kane* (1974) VR 759, Gowan J said 'Justice and humanity journey together. Cases frequently occur where a court is justified in adopting a course which may bear less heavily upon an accused than if he were to receive what is rather harshly expressed as being his just deserts, but mercy must be exercised by the considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well-balanced judgment. If a court permits sympathy to preclude it from attaching weight to the other well recognised elements of punishment, it has failed to discharge its duty'.<sup>97</sup>

Similarly, in *Rigney*, compassion clearly motivated the sentencing judge, who stated that:

There must be some room for compassion in understanding and making allowance for the tragedy of your situation ...In the result I have arrived at a sentence which I consider to be merciful.<sup>98</sup>

---

<sup>96</sup> See R Fox, 'When Justice Sheds a Tear', *ibid* at 25 relying on N Walker, 'The Quiddity of Mercy' above n 81 at 31 – 32. See also: N Walker, *Aggravation, Mitigation and Mercy*, above n 81 at 226.

<sup>97</sup> Unreported, NSW SC, 30 Jun 1998 at 11 –12.

<sup>98</sup> Unreported, SC SA, 21 May 1996 at 10 per Williams J. See also *Henschke*, unreported, SC SA, 7 Jul 1992, where Bollen J stated that 'you are entitled to a large measure of mercy, but I do not think the measure can go so far as to set you free now', at 3.

In *Roberts*, Hunt J stated that the 'very powerful subjective circumstances ... demand mercy, not further punishment'.<sup>99</sup> It is clear that the judges in these cases regarded the principle of mercy as operating against (and outside) what concepts of justice and punishment would dictate.

The second feature that can be identified in the approach to sentencing battered women which reflects principles associated with the operation of genuine mercy are the references to the seriousness of the accused's actions. In exercising genuine mercy (rather than mercy operating as a factor relevant to mitigation), Fox has asserted that the language used by the judge should not devalue the seriousness of the offence.<sup>100</sup> The need to stress the seriousness of the wrongdoing, when extending 'mercy', is clearly seen in the language used in sentencing women who kill violent partners.<sup>101</sup> For example, in *Manning*, the New South Wales Court of Criminal Appeal acknowledged that, 'one has the greatest sympathy for the appellant for the violence she has suffered at the hands of her husband'.<sup>102</sup> However, the Court was concerned to stress that:

One must not ignore the fundamental fact that no one – man or woman – must be encouraged in any way at all to go to a weapon – be it gun or knife – in order to solve a problem in the home, unless it be one in which the person genuinely fears death or serious bodily injury from the other.<sup>103</sup>

Despite the sympathy felt for the accused, there has been clear confirmation that the court must not be weakly merciful. In *Woolsey*, while recognising the sympathy felt for the accused, Newman J was 'keenly aware that a danger exists

---

<sup>99</sup> Unreported, SC NSW, 1 Aug 1989 at 14.

<sup>100</sup> As Fox has argued, 'any penalty reduction in the name of mercy must not be so great as to lead to the impression that the offence is being condoned by the courts. The proper exercise of mercy requires both that the language in which it is expressed by the sentencer, and the degree of reduction granted, be not such as to devalue the seriousness of the wrongdoing', R Fox, 'When Justice Sheds a Tear', above n 80 at 26.

<sup>101</sup> See 8.3.2

<sup>102</sup> Unreported, CCA NSW, 15 Apr 1988 at 6 per Lee J (with whom Carruthers and Campbell JJ agreed). See also *Simon*, unreported, SC NSW, 21 Jul 1995, where Bruce J stated that 'although I have enormous sympathy for the prisoner the use of a knife to take a life is objectively a very serious offence normally calling for the imposition of a significant penalty, at 5.

<sup>103</sup> Unreported, CCA NSW, 15 Apr 1988 at 6 per Lee J (with whom Carruthers and Campbell JJ agreed).

in cases such as this for a court to be weakly merciful'.<sup>104</sup> His Honour was concerned to emphasise that 'the courts of this State have made it plain that the use of knives in situations where violence is offered will usually result in stern retribution'.<sup>105</sup>

### 8.3.1.3 *Consequences of reliance on mercy*

It is encouraging that judges, in the exercise of their sentencing discretion, have recognised the need to afford leniency to battered woman due to the circumstances in which they kill. In particular, in cases where battered women receive non-custodial sentences in respect of killing their male partner,<sup>106</sup> I would agree that the sentence imposed is a good outcome in the individual case. However, I am concerned about the method used to achieve this outcome, and the implications for the development of the law. Reliance on mercy imports a number of undesirable concepts into the relationship between the criminal justice system and the battered woman who kills. Mercy is defined in the Oxford English Dictionary as 'the clemency or forbearance of a conqueror or absolute lord which it is in his power to extend or withhold as he thinks fit'.<sup>107</sup> Mercy is the:

Forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness; kind and compassionate treatment in a case where severity is merited or expected.<sup>108</sup>

It is something that can be granted to the 'deserving' and withheld from those who do not deserve it,<sup>109</sup> for as Fox has commented, 'in general understanding

<sup>104</sup> Unreported, SC NSW, 19 Aug 1993 at 13. See also *Broadrick*, unreported, SC NSW, 31 Aug 1988 per Hunt J at 10; *Hill* (1981) 3 A Crim R 397 per Street CJ at 401; *King*, unreported, SC NSW, 13 Aug 1998 per Studdert J at 19 – 20; *Whalen*, unreported, CCA NSW, 5 Apr 1991 per Lee CJ at CL at 6 – 7.

<sup>105</sup> Unreported, SC NSW, 19 Aug 1993 at 13.

<sup>106</sup> See 8.2.4.2 and 8.3.3.

<sup>107</sup> *Oxford English Dictionary* (2nd ed) 1989 cited by R Fox, 'When Justice Sheds a Tear', above n 80 at 4. As Portia says in Shakespeare's *The Merchant of Venice*, 'mercy is above this sceptred sway, It is enthroned in the hearts of kings, It is an attribute to God himself; And earthly power doth then show likest God's, When mercy seasons justice', Act IV, Scene I.

<sup>108</sup> *Oxford English Dictionary* (2nd ed) 1989. This definition is employed by R Fox, 'When Justice Sheds a Tear', *ibid* at 4.

<sup>109</sup> See *ibid* at 27.

and usage, mercy is regarded as a gift, not a right'.<sup>110</sup> In other words, the utilisation of 'mercy' brings notions of women being granted the 'gift' of leniency in circumstances warranting severity.

The concept of mercy enables judgments to be made concerning the 'appropriate' case for compassion, as well as operating to position the battered woman's claim to leniency outside the usual framework of the criminal justice system. The merciful approach to sentencing battered women reflects a broader inability to 'fit' women who kill their violent partners within the traditional framework of the criminal justice system. Women who kill their violent partners have struggled to have the legitimacy of their actions recognised within the framework of the substantive defences to murder, particularly within the defence of self-defence.<sup>111</sup> Women are viewed as 'Other' than the paradigm case that informs the defences of provocation or self-defence.<sup>112</sup> The classification of the sentence as 'merciful' also renders the battered woman's case as exceptional and outside the legitimate mitigatory framework. The use of the concept of mercy perpetuates the judicial system's willingness to express sympathy and compassion for these women, while not recognising the legitimacy of their actions.<sup>113</sup>

### 8.3.2 CONDEMNATION OF DOMESTIC VIOLENCE

#### 8.3.2.1 *Domestic violence as serious violence*

As discussed at 8.3.1.2, in cases where battered women kill, mercy has been used to extend leniency while at the same time judges have made strong statements affirming the seriousness of the accused's actions. The concern to condemn women's use of violence accords with the shift in judicial discourse in relation to

<sup>110</sup> *Ibid* at 4. Fox comments that 'though an offender cannot call for mercy as of right, sentencers cannot deny they possess an inherent discretion to be merciful, nor may they refuse to hear a submission on whether leniency under the head of mercy exists', at 25 citing *Miceli* [1998] 4 VR 588.

<sup>111</sup> See Chapter Six.

<sup>112</sup> See Chapters Five and Six. See D Nicolson, 'Criminal Law and Feminism', in D Nicolson & L Bibbings (eds), *Feminist Perspectives on Criminal Law*, London: Cavendish Publishing Limited, 2000 at 25.

<sup>113</sup> See further discussion of the problems of the 'sympathetic approach' to women who kill their violent partners at 4.4.3. See also 5.5.

the treatment of serious domestic offenders. Traditionally, the existence of an intimate relationship between the offender and the victim per se was viewed as a factor justifying the imposition of a more lenient sentence in the context of violent offending.<sup>114</sup> There is now increasing recognition that the 'domestic setting' of violence is not an intrinsically mitigating factor.<sup>115</sup> This attitude is reflected in the sentencing comments where women have been convicted of manslaughter in respect of killing their violent male partner. For example, in *Roberts*, Hunt J stated that, 'it has been made very clear by the courts that the taking of a human life, even within the context of domestic violence, will not be viewed with leniency'.<sup>116</sup> Similarly, in *Varagnolo*, McInerney J stated that, 'I should emphasis that it should not be taken that a person can commit domestic violence with impunity'.<sup>117</sup>

The judicial concern to condemn domestic violence means that female offenders are equally considered an appropriate vehicle for strong deterrent messages to the community. In *Osland*, the judge at first instance observed that there had been some debate about general deterrence in the context of battered women who kill. In particular, the issue was whether general deterrence:

---

<sup>114</sup> See K Warner, 'Sentencing the Violent Spouse', above n 2; K Warner, 'Sentencing in Cases of Marital Rape: Towards Changing the Male Imagination [2000] *Legal Studies* 592. See *Bell* (1992) 62 A Crim R 66 at 69 per Ipp J. See also *Attai*, unreported, CCA Vic, 11 Feb 1993; *Terranova*, unreported, CCA WA, 26 Oct 1993; *Palamidovski*, unreported, CCA NSW, 10 Oct 1986.

<sup>115</sup> See K Warner, 'Sentencing the Violent Spouse', *ibid.* See *Kerr*, unreported, CCA WA, 9 Jul 1997 at 4 per Kennedy J. A similar trend can be observed in 'domestic' sexual offences. The existence of a prior sexual relationship has traditionally been regarded as a relevant mitigating factor in cases of rape or sexual assault, see K Warner, 'Sentencing for Rape', above n 2 at 175; K Warner, 'Sentencing in cases of Marital Rape: Towards changing the Male Imagination' (2000) *Legal Studies* 592; S Kift, 'That all Rape is Rape Even if Not by a Stranger' (1995) 4 *Griffith Law Review* 60 at 86; P Easta, 'Rape in Marriage: Has the Licence expired?', above n 2. However, a trend has been recognised in recent appellate decisions to 'reject the general proposition that a more lenient view should be taken of rapes which are committed within or against the background of a sexual relationship with the victim', K Warner, 'Sentencing for Rape', above n 2 at 175.

<sup>116</sup> Unreported, NSW SC, 31 Aug 1989 at 12 per Hunt J. See *Woolsey*, unreported, SC NSW, 19 Aug 1993; *Broadrick*, unreported, SC NSW, 31 Aug 1988; *Owen*, unreported, CCA NSW, 5 Jun 1997; *Cornick*, unreported, CCA Tas, 28 Jul 1987.

<sup>117</sup> Unreported, NSW SC, 21 Mar 1996 at 33.

Involved the imposition of a sentence sufficient to deter battered women from taking the law into their own hands in respect of battering males, or to deter premeditated crimes of this kind or simply to deter homicide between spouses in difficult relationships.<sup>118</sup>

In addressing this debate, Hedigan J considered that all of those elements had a 'part to play in the consideration of general deterrence'. So, in sentencing battered women who kill, judges should have regard to the need to deter men who might kill their wives in 'difficult relationships'. In my view, this is not correct, as a distinction must be made between the killing of violent spouses and the killing of spouses in 'difficult relationships'.<sup>119</sup>

### 8.3.2.2 *Misunderstanding domestic violence*

It appears that in an effort to send a strong community message that domestic violence is serious violence, the judiciary have taken the stance that all 'domestic violence' must be opposed - no matter who the offender is. While I agree that domestic violence is serious (and should be condemned) whether committed by a male or a female, my contention is that the judiciary have failed to fully understand what is meant by 'domestic violence'. Violence used by women who kill their partners in response to a history of violence is not properly classified as 'domestic violence'. There is a fundamental difference between defensive violence in a domestic context and domestic violence per se, that is violence as part of a campaign to maintain control within a relationship.<sup>120</sup> And the judiciary have failed to make this crucial distinction.

The judicial condemnation of domestic violence (the woman's violence) evident in cases where women kill their violent partners co-exists with a tendency to minimise and obscure the violence of the deceased. Previous research has highlighted the tendency of the judiciary to minimise the seriousness of violence

<sup>118</sup> Unreported, SC Vic, 12 Nov 1996 per Hedigan J at 10. The accused's appeal against sentence was dismissed by the Court of Appeal: [1998] 2 VR 636. The issue of sentence was not the subject of the High Court appeal.

<sup>119</sup> See 8.3.2.2.

<sup>120</sup> See 2.5. This is a similar misconception that has been observed by Sheehy in relation to the Ottawa Crown's offence: "we're opposed to family violence, no matter who commits it", E Sheehy, 'Battered Women and Mandatory Minimum Sentences' (2001) 39 *Osgoode Hall Law Journal*, forthcoming.



inflicted on women by their violent partners.<sup>121</sup> These comments are amply supported in my research. Rather than acknowledge the seriousness of the threat that women face in the domestic context, the violence is characterised as a problem of the marriage. In the cases identified in my research, the male violence that precipitates the woman's fatal act has been variously described as 'the problems of the marriage',<sup>122</sup> 'domestic discord',<sup>123</sup> 'marital discord',<sup>124</sup> 'disputes not amenable to logic',<sup>125</sup> 'matrimonial discord',<sup>126</sup> or 'domestic problems',<sup>127</sup> 'problems between husband and wife',<sup>128</sup> or 'a problem in the home'.<sup>129</sup> The violence is viewed as a manifestation of a dysfunctional family rather than named as it really is - as rape, serious assault and attempted murder.<sup>130</sup>

A striking example of the trivialisation of male violence is found in *Rigney*,<sup>131</sup> where the accused set fire to the house in which her violent partner and his brother slept in a drunken stupor. The accused's partner had been routinely violent towards her. He had whipped her with wet towels until welts appeared, threw her around the house, carried an iron bar which he held to her throat and threatened to kill her. On the day of the killing, he had become increasingly violent towards her. He made her remove her clothes, and the level of violence continued to escalate. In describing the accused's injuries, Williams J commented that '[she] felt sore, embarrassed, humiliated, and not properly

---

<sup>121</sup> See R Busch, "Don't Throw Bouquets at Me ... (Judges) Will Say We're in Love" An Analysis of New Zealand Judges' Attitudes Towards Domestic Violence', in J Stubbs (ed), *Women Male Violence and the Law*, Sydney: Institute of Criminology, 1994; P Eastal, *Less than Equal: Women and the Australian Legal System*, Australia: Butterworths, 2001 at 39 – 40; P Eastal, 'Reconstructing Reality' (1995) 20 *Alternative Law Journal* 109; P Eastal & C Currie, 'Battered Women on Trial - Revictimisation by the Courts?' (1998) 3 *Sister-in-Law* 56; E Sheehy, above n 120.

<sup>122</sup> *Bobach*, unreported, SC NSW, 1 Nov 1988 at 6 per Lee CJ at CL.

<sup>123</sup> *Owen*, unreported, SC NSW, 15 Nov 1996 at 15 per McInerney J. The accused's appeal against sentence was dismissed, see unreported, CCA NSW, 5 Jun 1997.

<sup>124</sup> *Whalen*, unreported, CCA NSW, 5 Apr 1991 at 7 per Lee CJ at CL.

<sup>125</sup> *Simington and Saunders*, unreported, SC NSW, 4 Nov 1988 at 4 per Loveday J.

<sup>126</sup> *Broadrick* unreported, SC NSW, 31 Aug 1988 at 9 per Hunt J.

<sup>127</sup> *Cornick* unreported, SC Tas, 14 Aug 1986 at 2 per Wright J. The accused's appeal against sentence was dismissed, see unreported, CCA Tas, 28 Jul 1987.

<sup>128</sup> *Manning*, unreported, CCA NSW, 15 Apr 1988 at 6 per Lee J.

<sup>129</sup> *Manning*, unreported, CCA NSW, 15 Apr 1988 at 6 per Lee J.

<sup>130</sup> R Busch, above n 121 at 106.

<sup>131</sup> Unreported, SC SA, 21 May 1996.

recognisable by reason of the bruising on [her] body'.<sup>132</sup> Despite the severity of the violence inflicted on the accused, it was only the expert evidence of the accused's major depression and her disoriented mind that satisfied his Honour that 'it would be simplistic and unfair to regard the situation as being simply a long drawn out domestic drunken argument'.<sup>133</sup> Absent, in his Honour's comments, is an appreciation of the seriousness of domestic violence.

As I argued at 8.3.1, in many cases, judges have taken a 'merciful' approach to sentencing battered women who kill. And while there have been expressions of sympathy for the accused's difficult situation, my contention is that there has been a corresponding failure truly to comprehend the situation that the accused faced. The labelling of the violence as a problem of the relationship deflects attention from its seriousness, and also the 'maleness' of the violence. The violence is subsumed under the label of an unhappy marriage for which both parties share responsibility. The trivialisation of the violence of the deceased in sentencing comments makes it difficult to argue that domestic violence is sufficiently serious to warrant the use of fatal defensive force.<sup>134</sup>

### 8.3.3 THE EXCEPTIONAL CASE: NEW SOUTH WALES<sup>135</sup>

Although mercy may temper justice, the need to place an adequate value on human life and the concern to send the message that domestic violence will not be tolerated<sup>136</sup> has meant that the courts have adopted the principle that a non-custodial sentence is only appropriate in a most 'exceptional' case of

---

<sup>132</sup> Unreported, SC SA, 21 May 1996 at 7.

<sup>133</sup> Unreported, SC SA, 21 May 1996 at 10.

<sup>134</sup> See 6.3.2 in relation to assessing the nature of the threat for self-defence.

<sup>135</sup> I have chosen to focus on the 'exceptional' case principle in New South Wales, as it provided a sample of a number of cases from the same jurisdiction. There has not been the same clear statement of the 'exceptional' case in other Australian jurisdictions in cases where women have killed their male partner. However, in cases where non-custodial sentences were imposed the same features tended to emerge - domesticity and pathology: see *Gilbert*, unreported, SC WA, 4 Nov 1993; *Brauer*, unreported, SC SA, 16 Feb 1988; Taylor, *Bradley*, unreported, SC Vic, 14 Dec 1994; *Denney* [2000] VSC 323; *M*, unreported, SC SA, 31 Jan 1986. There were cases that did not fall within this pattern: *Nichols*, unreported, SC Tas, 15 Dec 1986 (impulsive act); *Rogers*, unreported, SC Vic, 11 Dec 1995 (alcohol); *Billeley*, unreported, SC SA, 31 Jul 1987 (alcohol).

<sup>136</sup> See 8.3.2.

manslaughter.<sup>137</sup> The principle of the 'exceptional' case has been most clearly articulated in New South Wales, and in the context of women who kill their partners, an important decision that has encapsulated the principle is that in *Bogunovich*.<sup>138</sup> In New South Wales, a recognisance was imposed on battered women in 7 of the 30 manslaughter cases.<sup>139</sup> In two further cases, sentences of periodic detention were imposed.<sup>140</sup> In other Australian jurisdictions, non-custodial sentences (a suspended sentence or probation) were imposed in 9 of the 24 manslaughter cases identified in my research.<sup>141</sup>

In *Bogunovich*, Maxwell reviewed the principles applicable to the exercise of the sentencing discretion in cases of manslaughter in the context of domestic violence. His Honour recognised the tension inherent in striking a balance between the sympathy felt for the accused and the need for a strong judicial stance against domestic violence.<sup>142</sup> In view of this, Maxwell J concluded that '[t]he one principle to be extracted from the authorities is that it is only in the most exceptional cases a court will impose a non-custodial sentence'.<sup>143</sup> In classifying the case as a 'most exceptional' case (and deferring the imposition of sentence and imposing a recognisance), Maxwell J sought to reflect community views about the culpability of the offender and the seriousness of the offence.

---

<sup>137</sup> For example, in *Kennedy* [2000] NSWSC 109, Barr J stated that 'it is now well established that when a human life is taken, even within the context of domestic violence, the Courts will not deal leniently with the offender unless the case is exceptional. It is only in the most exceptional case that a non-custodial sentence will be imposed', at [56].

<sup>138</sup> (1985) 16 A Crim R 456. See also discussion of the 'tragic case' in H Donnelly et al, above n 2 at 101 – 102.

<sup>139</sup> *Gardner*, unreported, SC NSW, 27 Mar 1992; *Bogunovich* (1985) 16 A Crim R 456; *Kennedy* [2000] NSWSC 109; *Kennedy*, unreported, SC NSW, 20 Jun 1998; *Roberts*, unreported, SC NSW, 1 Aug 1989; *Varagnolo*, unreported, SC NSW, 21 Mar 1996; *Woolsey*, unreported, SC NSW, 19 Aug 1993. In New South Wales, the power to impose a recognisance was contained in *Crimes Act* (NSW) s 558. This section has been repealed by the *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW). The power to impose a non-custodial sentence is now found in *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 2 Division 3, particularly section 9 that provides for the imposition of a good behaviour bond.

<sup>140</sup> *Lalor*, unreported, SC NSW, 21 Jul 1995; *Spencer*, unreported, SC NSW, 18 Dec 1992.

<sup>141</sup> *Bradley*, unreported, SC Vic, 14 Dec 1994; *Denney* [2000] VSC 323; *Gilbert*, unreported, SC WA, 4 Nov 1993; *M*, unreported, SC SA, 31 Jan 1986; *Taylor*, unreported, SC SA, 16 Jun 1993; *Billeley*, unreported, SC SA, 31 Jul 1987; *Brauer*, unreported, SC SA, 16 Feb 1988; *Nichols*, unreported, SC Tas, 15 Dec 1986; *Rogers*, unreported, SC Vic, 11 Dec 1995. This does not include *Rose*, unreported, SC WA, Aug 1989 (91/89) as I was unable to ascertain the sentence imposed. See 8.2.4.2.

<sup>142</sup> (1985) 16 A Crim R 456 at 461 quoting the Chief Justice in *Whiting*, unreported, CCA NSW, 27 Sept 1979 at 5.

His Honour considered that a non-custodial penalty could only be imposed in circumstances when it did 'not disregard the proved circumstances' or 'fail to accord with the general moral sense of the community'.<sup>144</sup> In assessing community morality, his Honour adopted the test that a non-custodial sentence was appropriate if 'ninety-nine average right-minded citizens of Sydney out of 100 ... would not unhesitatingly say that a sentence of imprisonment was called for'.<sup>145</sup>

Although the general principle is clear (non-custodial sentences are appropriate only in exceptional cases), it is less clear what constitutes exceptional circumstances. There is a lack of explicit judicial guidance as to the circumstances in which a non-custodial sentence will be appropriate: when does the general moral sense of the community hold that a sentence of imprisonment is not required? Rather than articulating guidelines, in imposing non-custodial sentences judges have taken care to stress the unique and unusual circumstances of the case, so as to limit the operation of the principle. For example, in *Gardner*, Wood J was prepared to impose a non-custodial sentence, as he considered that '[i]t appears to me that she has suffered enough in life to this point'.<sup>146</sup> However, His Honour 'stressed that this is a wholly exceptional case and it should not be regarded as providing any form of precedent for other cases of domestic killing'.<sup>147</sup> The 'exceptional case' creates a sense of individualised claims for leniency, rather than the operation of readily discernible principle.

Although judges have stressed the unique nature of the facts, my analysis of the cases in which a non-custodial sentence was imposed discloses a number of common features. A history of violence was apparent in all cases where a non-custodial sentence was imposed upon a woman who killed her partner. However, prior violence by the deceased to the accused was not a sufficient condition. In

---

<sup>143</sup> (1985) 16 A Crim R 456 at 461.

<sup>144</sup> (1985) 16 A Crim R 456 at 461.

<sup>145</sup> *Bogunovich* (1985) 16 A Crim R 456 at 462. This test has been subsequently applied in other cases of domestic manslaughter in New South Wales, see *Roberts*, unreported, SC NSW, 1 Aug 1989; *Varagnolo*, unreported, SC NSW, 21 Mar 1996, and *Kennedy*, unreported, SC NSW, 30 Jun 1998.

<sup>146</sup> Unreported, SC NSW, 27 Mar 1992 at 11.

<sup>147</sup> Unreported, SC NSW, 27 Mar 1992 at 12.

cases in New South Wales where non-custodial sentences were imposed, three broad themes were apparent in the sentencing comments: (1) psychological deficiencies caused by domestic violence; (2) the welfare of the accused's children; (3) lack of intent. In five of the seven cases where a non-custodial sentence was imposed in New South Wales, there is judicial focus on the psychiatric/ psychological evidence that detailed the psychological impact of the violence on the accused.<sup>148</sup> Similarly, the care of children was a factor identified as relevant to the classification of the case as an exceptional case in five of the seven cases.<sup>149</sup> In six of the seven cases, the manslaughter conviction was based on the lack of the requisite intent for murder.<sup>150</sup>

### 8.3.3.1 *Psychological deficiency caused by domestic violence*

It appears that it is not the violence per se, but the impact of the violence on the psychological state of the accused that is pertinent in the classification of the case as an exceptional case. In the foundational case of *Bogunovich*, while the violence inflicted on the accused and her children by her husband clearly made an impact upon the sentencing judge,<sup>151</sup> the potency of the objective facts of the violence as a mitigating factor was diminished by the extensive reliance placed on a report of the accused's psychiatrist. The psychiatrist detailed the violence of

<sup>148</sup> *Bogunovich* (1985) 16 A Crim R 456; *Woolsey*, unreported, SC NSW, 19 Aug 1993. See also *Varagnolo*, unreported, SC NSW, 21 Mar 1996: recognisance - BWS; *Kennedy* [2000] NSWSC 109: recognisance - serious depression; *Gardner*, unreported, SC NSW, 27 Mar 1992: recognisance - repressed emotions. In *Roberts*, unreported, SC NSW, 1 Aug 1989, there are references made to the accused's psychology, however the more dominant theme in the sentencing comments is the accused's aboriginality (see 8.3.5) and her role as a mother (see 8.3.3.2). In *Kennedy*, unreported, SC NSW, 20 Jun 1998, although there was reference made to the deceased's violence in the sentencing comments, a non-custodial sentence was made on the basis of the conditions suffered by the accused - osteoarthritis, diabetes, asthma, dementia - and the finding of lack of intent. It was stated that 'this is a case which combines the lack of intent, the basic elements being unlawful and dangerous act, confusion, the effect of the drugs and illnesses, the effect of age, the effect of alcohol' at 13.

<sup>149</sup> See *Varagnolo*, unreported, SC NSW, 21 Mar 1996; *Roberts*, unreported, SC NSW, 1 Aug 1989; *Woolsey*, unreported, SC NSW, 19 Aug 1993; *Kennedy* [2000] NSWSC 109; *Gardner*, unreported, SC NSW, 27 Mar 1992. See also *McIntyre*, unreported, SC NSW, 15 Mar 1996.

<sup>150</sup> *Varagnolo*, unreported, SC NSW, 21 Mar 1996; *Woolsey*, unreported, SC NSW, 19 Aug 1993; *Bogunovich* (1985) 16 A Crim R 456; *Roberts*, unreported, SC NSW, 1 Aug 1989; *Kennedy*, unreported, SC NSW, 20 Jun 1998; *Kennedy* [2000] NSWSC 109. See comments in *King*, unreported, SC NSW, 13 Aug 1998 at 19 per Studdert J. An exception is the case of *Gardner*, unreported, SC NSW, 27 Mar 1992 where the accused's plea of guilty to manslaughter was accepted based on provocation and a non-custodial sentence imposed.

<sup>151</sup> (1985) 16 A Crim R 456 at 457, 462 per Maxwell J.

the accused's husband towards her in terms of its impact on her psychological state - the development of a major depressive illness. The psychological approach to mitigation evident in *Bogunovich*<sup>152</sup> (a pre-BWS case) has provided the framework for assessing women's claims to mitigation in subsequent cases.

In *Woolsey*, the psychiatric/psychological evidence indicated that the accused was suffering BWS, and Newman J considered that this was a 'powerful mitigating circumstance'.<sup>153</sup> In reviewing the relevant principles for sentencing in cases of domestic manslaughter, it is telling that Newman J conflates BWS with domestic violence: '[t]he mitigating effect of the battered woman's syndrome or as he put it domestic violence was reviewed by Maxwell J in *R v Bogunovich*'.<sup>154</sup> The relevance of domestic violence to the 'exceptional case' has become aligned with the accused's categorisation as a sufferer of BWS.<sup>155</sup> As a factor in sentencing, the existence of ongoing and sustained violence is not truly addressed, as its relevance is subsumed by the (abnormal) psychological state of the accused.

### Treatment versus punishment

The psychologisation of women's response to domestic violence conforms to the stereotypical construction of the 'normal' woman in terms of psychological dysfunction.<sup>156</sup> This focus on the accused's psychology assists in perceiving the accused as 'sick' rather than dangerous. By this process, the female accused is rendered in need of 'treatment' rather than punishment.<sup>157</sup> For example, in *Kennedy*, the sentencing judge stated that:

The preponderance of psychological evidence shows that the prisoner's systematic exposure to beatings at the hands of her mother and then her husband and her addiction to alcohol have combined to form in her feelings of worthlessness, giving rise in my opinion to a substantial

<sup>152</sup> (1985) 16 A Crim R 456.

<sup>153</sup> Unreported, SC NSW, 19 Aug 1993 at 9.

<sup>154</sup> Unreported, SC NSW, 19 Aug 1993 at 9.

<sup>155</sup> See 7.3 for a consideration of BWS evidence.

<sup>156</sup> See 4.2.

<sup>157</sup> See H Allen, 'Rendering them Harmless: The Professional Portrayal of Women Charged with Serious Violent Crimes', in P Carlen & A Worrall (eds), *Gender Crime and Justice*, Philadelphia: Open University, 1987; H Allen, *Justice Unbalanced: Gender, Psychiatry and Judicial Decisions*, Milton Keynes: Open University Press, 1987.

fear that she may harm herself if not appropriately supervised, counselled and, if appropriate, treated.<sup>158</sup>

In *Varagnolo*, it was observed that the accused 'needs extensive therapy and support and counselling so that she can reconstruct and redirect her life'.<sup>159</sup> The accused's presentation as a tragic figure makes her the appropriate subject for assistance and counselling to 'recover' from the crime. In this regard, there are references to the weighty self-punishment that the accused has inflicted on herself. It is noted that '[she] continues to suffer considerable psychological pain as a result of the death of the deceased'.<sup>160</sup> This reinforces the absence of a need for state punishment.

### Critique of the psychological approach to domestic violence

In the exercise of the sentencing discretion, the construction of the women's actions in terms of abnormality and pathology serves to distance women from responsibility for their violent conduct, and so render them suitable candidates for more lenient treatment.<sup>161</sup> The need to present the accused in terms of her psychological deficiencies means that action inconsistent with an inability to act, passivity and helplessness are ignored or downplayed. This can be seen in *Woolsey*, where Newman J deferred imposing sentence on condition that the accused enter into a recognisance to be of good behaviour for four years.<sup>162</sup> In the course of the sentencing comments, His Honour relied upon the medical assessments of the accused. The psychiatrist noted that as a sufferer of BWS '[t]here is a profound incapacity to act decisively to protect themselves or their children'. As I observed at 4.4.2.3, this assessment of the accused appears to be at variance with her act of stabbing her partner in the heart following his violence to her son and herself – an act that is a fairly decisive act in self-protection and in the protection of her children.<sup>163</sup> The psychologist concentrated

<sup>158</sup> [2000] NSWSC 109 at [55] per Barr J.

<sup>159</sup> Unreported, SC NSW, 21 Mar 1996 at 26 per McInerney J.

<sup>160</sup> Unreported, SC NSW, 21 Mar 1996 at 32 per McInerney J.

<sup>161</sup> See also 4.4.

<sup>162</sup> This case is discussed in the context of lack of intent at 4.4.2.3.

<sup>163</sup> A criticism of BWS evidence is the disparity between the presentation of the accused as helpless and passive, and the infliction of fatal violence, see E Sheehy, J Stubbs & J Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations'

on her limited ability to cope with stress, thereby discounting her proven ability to care for her two mentally disabled children (aged seventeen and eighteen) and her four year old daughter, while at the same time coping with her unemployed, alcoholic and violent spouse.

Although the psychologisation of women's responses to domestic violence may be an effective strategy in the reduction of sentence, my concern is that this approach serves to reinforce negative stereotypes of the irrational and emotional woman. The willingness to psychologise women's responses to domestic violence confirms the need for caution in the use of BWS as a mechanism to inform the court of the dynamics of domestic violence.<sup>164</sup> In an earlier study of homicide between sexually intimate partners conducted between 1988 and 1990, Easteal analysed the sentencing comments for ten women who killed their violent male partner in Victoria and New South Wales. Easteal argued for the reception of BWS evidence as a means for informing the judiciary in relation to the dynamics of battering.<sup>165</sup> In her discussion of an alternative sentencing model, Easteal commented that, '[p]aradoxically, if BWS had been available for women, those who received the harshest sentences might have been treated more leniently or even acquitted'.<sup>166</sup>

In my view, the reception of BWS evidence as a matter of mitigation has not realised Easteal's vision of a judiciary that possesses a sound understanding of the dynamics of a violent relationship. Rather, BWS has confirmed the approach traditionally adopted in relation to the sentencing of violent women – to seek to explain their actions in terms of their role in the family and their pathology. The potency of 'domestic violence' as a factor in the acceptance of the case as 'most exceptional' is dependent upon the construction of the woman within accepted stereotypes of the good woman/victim – passive, irrational and unable to cope. Instead of recognising the seriousness of domestic violence, the psychological

---

(1992) 16 *Criminal Law Journal* 369 at 384 – 385; K O'Donovan, 'Defences for Battered Women Who Kill' (1991) 18 *Journal of Law and Society* 219 at 231; D Faigman, 'The Battered Woman Syndrome and Self-Defence: A Legal and Empirical Dissent' (1986) 72 *Virginia Law Review* 619 at 641. See also 7.3 for a critical consideration of BWS evidence.

<sup>164</sup> See 7.3.

<sup>165</sup> P Easteal, *Killing the Beloved*, above n 2 at 145.



focus on domestic violence means that the impact that violence has on the sentencing process is defused. This is ultimately damaging to women's legitimate self-defence claims, as it impedes the proper assessment of each woman's circumstances, as well as deflecting attention from the male violence.

### 8.3.3.2 A 'Good Mother': Hardship to Children

In the 'most exceptional' case, as well as focusing on the psychological impact of the violence on the accused, there was a clear judicial interest in the accused's positioning as a mother and the potential impact of the accused's imprisonment on her children. In the exercise of the sentencing discretion, the focus on the accused's status as mother has a two-fold effect: it provides a cloak for the centrality of the family in the judicial consciousness and it serves to position the accused as not 'really criminal'.<sup>167</sup>

#### Centrality of the family

The focus on the accused's role as mother in the classification of an 'exceptional' case reflects the judicial concern with the maintenance of the family unit. In the exercise of the sentencing discretion, the general rule is that hardship to third parties (such as the offender's children) caused by the accused's imprisonment is 'usually only of minimal importance in sentencing, especially where the offence ... is a serious one'.<sup>168</sup> The imprisonment of an accused may well deprive a family of a breadwinner or a caregiver. However, usually, it is acknowledged that hardship to others is a necessary corollary of imprisonment. As Green CJ stated in *Sullivan*, 'it is unhappily the case that frequently a sentence of imprisonment will impose hardship on a convicted person's dependents'.<sup>169</sup>

The courts have recognised an exception to the general principle that hardship to third parties is not usually relevant in the imposition of sentences in cases of extreme hardship. In these cases, the hardship must go beyond the sort of

---

<sup>166</sup> *Ibid* at 143.

<sup>167</sup> See 4.2.

<sup>168</sup> R Fox & A Freiberg, above n 11 at 3.904.

<sup>169</sup> [1975] Tas R (NC) 1 at 1.

hardship which inevitably results to a family following imprisonment.<sup>170</sup> The circumstances must be such that a 'sense of mercy or affronted common sense imperatively demands that [the sentencing judge] should draw back'.<sup>171</sup> If the imprisonment of a parent would leave the children without parental care then authority has recognised that hardship to the children may be considered exceptional.<sup>172</sup> Although there seems a certain irony that a person who kills their partner (the other parent) is able to rely in mitigation on the fact that if they are imprisoned the children will be left without parental care,<sup>173</sup> the courts have been concerned not to unduly penalise the 'innocent' parties – the children.

The focus on the children, and the mitigating capabilities of a woman's role as care giver reveals the centrality of the family in judicial decision making.<sup>174</sup> As Daly comments, 'judges emphasise ... the value of women's unpaid labour as mothers and the psychological importance of maintaining the mother-child bond'.<sup>175</sup> There is a judicial acceptance of the social value of childcare responsibilities, and the social costs inherent in the imprisonment of women who have children due to the 'break up [of] families' and the 'punish[ment] [of] innocent family members'.<sup>176</sup>

This is seen in the sentencing remarks in cases where women have killed their partner. The woman's role as the carer of children has been at the forefront of the judge's mind in some cases. For example, in *Woolsey*, Newman J relied on Hunt CJ at CL in *Roberts*, that:

<sup>170</sup> *Maslen* (1995) 79 A Crim R 199; *Wirth* (1976) 14 SASR 291.

<sup>171</sup> *Boyle* (1987) 34 A Crim R 202 at 204 – 206 per Burt CJ.

<sup>172</sup> R Fox & A Freiberg, above n 11 at 3.904. See for example: *Boyle* (1987) 34 A Crim R 202; *Vaughan* (1982) 4 Cr App R (S) 83; *Sinclair* (1990) 108 FLR 370; *Warrell v Kay* (1995) 83 A Crim R 493.

<sup>173</sup> It is noted that it is not only women who have relied on hardship to the children as a mitigating factor: see *Moffa [No 2]* (1977) 16 SASR 155.

<sup>174</sup> See K Daly, 'Rethinking Judicial Paternalism' above n 1; K Daly, 'Neither Conflict Nor Labelling Nor Paternalism Will Suffice', above n 1; K Daly, *Gender, Crime & Punishment*, above n 1. The centrality of the family has also been observed in the context of sentencing for sexual offences in the domestic context, see K Warner, 'Sentencing the Violent Spouse', above n 2.

<sup>175</sup> K Daly, *Gender, Crime & Punishment*, *ibid* at 19.

<sup>176</sup> K Daly, 'Neither Conflict Nor Labelling Nor Paternalism Will Suffice', above n 1 at 138.

Where in the particular case there is any choice available, it would be a steely-hearted judge indeed who did not take into account in making that choice the plight of such young children being left without any parents.<sup>177</sup>

It was held that the 'background of domestic violence [understood as BWS]<sup>178</sup> and the situation of the prisoner's children combine to constitute special circumstances' and the sentence was deferred conditional on the accused entering a recognisance to be of good behaviour.<sup>179</sup> Similarly, in *Varagnolo*, McInerney J considered that 'this is such an exceptional case where the welfare of the children should weigh very heavily in the question of what approach I should take in sentencing'.<sup>180</sup> In deferring the imposition of sentence, his Honour expressed the view that the three young children had:

Gone through a most traumatic experience and have lost their father, and at this point of time I believe that their mother's love and care is vital to their future. They should not be asked to suffer further.<sup>181</sup>

In cases of ongoing domestic violence (as in *Varagnolo*), there is a view that the children have suffered too much by their experience of living in a violent relationship, and that the children should be the recipients of mercy by having the continued care of their mother.

### The domesticity of the 'good mother'

The maintenance of the family unit and the concern for children who will be left without a mother's care does not keep every woman who kills her violent partner out of prison. As previous research has shown, leniency is not afforded on the basis of a person's classification as a 'mother', but her status as a good mother (and so a good woman).<sup>182</sup> In my analysis, the label of 'care of children' masks

<sup>177</sup> Unreported, SC NSW, 19 Aug 1993 at 12. See also *Carlton*, unreported, SC NSW, 4 Apr 1989 at 9 per Carruthers J. This was a case where the accused shot her violent defacto partner, and was convicted of malicious wounding with intent to do grievous bodily harm.

<sup>178</sup> See 8.3.3.1.

<sup>179</sup> Unreported, SC NSW, 19 Aug 1993 at 13 per Newman J.

<sup>180</sup> Unreported, SC NSW, 21 Mar 1996 at 31.

<sup>181</sup> Unreported, SC NSW, 21 Mar 1996 at 31.

<sup>182</sup> See 4.2.1. See also C Hedderman & L Gelsthorpe, above n 1; M Fox, 'Judicial Discretion and Gender Issues in Sentencing', above n 1; S Edwards, *Women on Trial*, above n 1; A Worrall, *Offending Women*, above n 1. Fox comments that Edward's observation that 'the issue in question is whether or not the defendant ... conform[s] to conventional, middle-class

an interest in the 'care of children' by a particular sort of mother. For example, in *Varagnolo*, McInerney J observed that '[i]n cases where the act is accepted as an unlawful and dangerous act recognisances have on many occasions been given'. His Honour noted two criteria – they were 'manslaughter domestic violence cases', and cases 'where the care of children was involved'.<sup>183</sup> Immediately after the reference to care of children, his Honour comments that the accused was described as 'a very good humble mother', 'a wonderful mother'.<sup>184</sup> The apparent implication is that concern for the care of the children involved an assessment of the accused's maternal capabilities, and that in this case, the accused was a worthy mother. There are references to the accused as 'a very caring, gentle and involved mother';<sup>185</sup> a woman who 'keeps the home beautifully and ... loves the children';<sup>186</sup> 'a great mum [whose] ... children are always fed and well clothed';<sup>187</sup> a woman 'who seemed to be there for the children always'.<sup>188</sup> The accused is portrayed as a woman who has succeeded in being a good mother against the odds. In spite of her partner's violence, her deprived circumstances and her BWS, '[s]he had made a valiant attempt to raise her children using whatever skills and resources she had at her disposal'.<sup>189</sup>

In contrast, if the accused was a 'bad' mother, then the requirements of mercy did not appear to dictate a non-custodial sentence. If an accused is a drug user and/or abused alcohol, then her partner's violence tended to be characterised as a symptom of a mutually destructive relationship. The accused's complicity in the maintenance of a destructive relationship, and her use of alcohol and/or drugs meant that she was not viewed as a good mother (and so references to her mothering capabilities are less frequent and less relevant). An example is found

---

expectations, of appropriate motherhood and wifeliness' provides 'one illustration of how the criminal process is instrumental in promoting a specific conception of the appropriate family and shoring up conventional gender roles within that unit', M Fox, 'Judicial Discretion and Gender Issues in Sentencing', above n 1 at 332.

<sup>183</sup> Unreported, SC NSW, 21 Mar 1996 at 30.

<sup>184</sup> Unreported, SC NSW, 21 Mar 1996 at 30. These extracts have also been relied upon at 4.4.2.3.

<sup>185</sup> Unreported, SC NSW, 21 Mar 1996 at 9.

<sup>186</sup> Unreported, SC NSW, 21 Mar 1996 at 28.

<sup>187</sup> Unreported, SC NSW, 21 Mar 1996 at 28.

<sup>188</sup> Unreported, SC NSW, 21 Mar 1996 at 13.

<sup>189</sup> Unreported, SC NSW, 21 Mar 1996 at 6.

in *Moore*, where the needs of the accused's younger children were not such as to make the imposition of a non-custodial sentence appropriate. The accused stabbed her defacto husband in the context of a 'relationship [that] was one accompanied on occasions by violence, in a setting where both the deceased and the prisoner were drinking alcohol to excess'.<sup>190</sup> Following the death of her defacto husband, the accused spent time at a drug and alcohol rehabilitation centre. The New South Wales Court of Criminal Appeal commented that the accused 'went there to help cure her alcohol problem. It was something that she needed to do for herself and her children'.<sup>191</sup> The accused's mothering skills were clearly considered questionable, and in these circumstances, the New South Wales Court of Appeal commented that the 'Judge was aware of the needs of Ms Moore's younger children and the importance of her relationship with them'.<sup>192</sup> Her appeal against her sentence of six years with a minimum term of three year was rejected.

In other cases, the view taken as to seriousness of the accused's act precluded any real relevance attaching to the hardship suffered by the accused's children. There are some cases where the existence of children of the accused is mentioned as a 'fact', but seemingly without any (or little) mitigating relevance.<sup>193</sup> In *Coupe*, for example, the accused was found guilty of manslaughter by a jury, and was sentenced to a term of four years and four

---

<sup>190</sup> Unreported, SC NSW, 2 May 1997 at 1 per Newman J. See also *Hona*, unreported, SC NSW, 9 Oct 1992, where the accused was sentenced to a term of seven years imprisonment with a minimum term of four and a half years. She had two children aged eight and three. In *Owen*, unreported, CCA NSW, 5 Jun 1997, the accused was sentenced to a term of eight and a half years with a minimum term of four and a half years. The accused had a number of children but none of them were in her custody. In these cases, the accused had a drug and/or alcohol problem.

<sup>191</sup> Unreported, CCA NSW, 16 Jun 1998 at 4 per Smart J, with whom Dunford and Ireland JJ agreed.

<sup>192</sup> Unreported, CCA NSW, 16 Jun 1998 at 4 per Smart J, with whom Dunford and Ireland JJ agreed. It is not clear from the sentencing comments the precise age of her children. It is noted that the accused had three children by a prior relationship that ended in 1991 and one child of another relationship that ended between 1991 and 1993. The child was born after the end of the relationship, so at the time of the trial, the age of the child would have been in the range of four to six (approximately).

<sup>193</sup> In *Whalen*, unreported, NSW CCA, 5 Apr 1991, the accused was sentenced to a term of imprisonment of eight years with a minimum term five years. There is reference to the two children of the relationship, but it is unclear as to age. In *Manning*, unreported, CCA NSW, 15 Apr 1988, the accused was sentenced to a term of five years imprisonment with a non-parole period of two years. She had a daughter who was 12 or 13.

months with a minimum term of 30 months. The accused had a newborn baby from a new relationship, and 'it was put on her behalf that [the judge] should not deny that child a proper relationship with its mother for any longer than is absolutely necessary'.<sup>194</sup> The accused had asked that a sentence of periodic detention be imposed. Although Hunt J imposed sentence on the ground that she lacked the requisite intent for murder, he considered that the seriousness of the offence precluded the imposition of periodic detention: 'it involved the deliberate pointing of the rifle at the deceased and firing it at him'.<sup>195</sup>

The focus on the accused's role as mother in the cases identified in my research is in conformity with previous research that has indicated that the treatment of women by the criminal justice system is dependent on their 'domesticity' – their positioning as wife and mother.<sup>196</sup> If an accused was a 'good mother', then there is a belief that her role as a mother is an integral part of her rehabilitation.<sup>197</sup> In *Varagnolo*, the accused's rehabilitation was linked with her role as mother. It was observed that the accused:

Needs extensive therapy and support and counselling so that she can reconstruct and redirect her life. Her current principal role of mother to her children is very important to her and she feels quite committed to her responsibility for the children.<sup>198</sup>

Similarly, in *Woolsey*, Newman J stated that, '[a]s far as considerations of rehabilitation are concerned, it may be confidently said that the prisoner's future is entwined with the care of her children'.<sup>199</sup> These statements suggest that the

---

<sup>194</sup> Unreported, SC NSW, 28 Jun 1990 at 3 – 4 per Hunt J. The accused also had the care of a 12-year-old child from a previous relationship.

<sup>195</sup> Unreported, SC NSW, 28 Jun 1990 at 4.

<sup>196</sup> See D Nicolson, 'Telling Tales: Gender Discrimination, Gender Construction and Battered Women who Kill' (1995) 2 *Feminist Legal Studies* 185 at 188. See also M Fox, 'Judicial Discretion and Gender Issues in Sentencing', above n 1; M Fox, 'Feminist Perspectives on Theories of Punishment', in D Nicolson & L Bibbings (eds), *Feminist Perspectives on Criminal Law*, London: Cavendish Publishing Limited, 2000; H Allen, *Justice Unbalanced*, above n 157; H Allen, 'Rendering them Harmless', above n 157; M Eaton, above n 1; C Hedderman & L Gelsthorpe, above n 1.

<sup>197</sup> H Allen, 'Rendering them Harmless', *ibid* at 88.

<sup>198</sup> Unreported, SC NSW, 21 Mar 1996 at 26 per McInerney J. See also *Kennedy* [2000] NSWSC 109; *Gardner*, unreported, SC NSW, 27 Mar 1992.

<sup>199</sup> Unreported, SC NSW, 19 Aug 1993 at 13.

view that the family operates as a site of social control is still current in judicial thinking.<sup>200</sup>

### 8.3.3.3 *Lack of intent*

In New South Wales, it has been accepted that the 'exceptional' case principle applies to provocation manslaughter.<sup>201</sup> However, in the context of women who have killed their male partner, there has been only one provocation manslaughter case in New South Wales in which a non-custodial sentence was imposed.<sup>202</sup> As discussed at 8.3.3, in the remaining six cases where non-custodial sentences were imposed on battered women, the manslaughter conviction was based on the lack of the requisite intent for murder.<sup>203</sup> Recent New South Wales cases suggest that the distinction between manslaughter based on lack of intent and manslaughter where the accused had the requisite intent is likely to continue to be an important factor in the classification of a case as an 'exceptional case'.<sup>204</sup>

As discussed in Chapter Four, a finding of lack of intention has implications in regard to the assessment of the woman's criminality. In general, the treatment of women by the criminal justice system rests upon the misleading construction of women as victim/offender and victim/agent. Favourable legal outcomes for individual battered women appear dependent on the accused's conformity to 'victim' status – passive, irrational and lacking agency. Intentionality and responsibility are associated with premeditation – the cold and wicked killer.<sup>205</sup> Intentionality serves as the mark of the 'dangerous' female offender - whether

<sup>200</sup> See C Hedderman & L Gelsthorpe, above n 1 at 47 – 49.

<sup>201</sup> See *Alexander* (1994) 78 A Crim R 141 Hunt CJ at CL agreed with the view that 'it is only in most exceptional circumstances that a non-custodial sentence will be imposed in a domestic provocation case', at 145.

<sup>202</sup> See *Gardner*, unreported, SC NSW, 27 Mar 1992. In this case, it was not disputed that the accused had the requisite intent for murder, however, the accused's intentionality was reduced by psychological evidence of diminished responsibility.

<sup>203</sup> *Varagnolo*, unreported, SC NSW, 21 Mar 1996; *Woolsey*, unreported, SC NSW, 19 Aug 1993; *Bogunovich* (1985) 16 A Crim R 456; *Roberts*, unreported, SC NSW, 1 Aug 1989; *Kennedy*, unreported, SC NSW, 20 Jun 1998; *Kennedy* [2000] NSWSC 109. See comments in *King*, unreported, SC NSW, 13 Aug 1998 at 19 per Studdert J.

<sup>204</sup> See *King*, unreported, SC NSW, 13 Aug 1998; *McIntyre*, unreported, SC NSW, 15 Mar 1996.

<sup>205</sup> M Rollinson, 'Re-reading Criminal Law: Gendering the Mental Element', in D Nicolson & L Bibbings (eds), *Feminist Perspectives on Criminal Law*, London: Cavendish Publishing Limited, 2000 at 118. See *Collingburn* (1985) 18 A Crim R 94; *Morabito* (1992) 62 A Crim R 82.

she is a 'true criminal' (a 'bad' woman) or a 'true woman' (a 'good' woman).<sup>206</sup> In contrast, 'the suppression or denial of criminal intention [means that] the violent deed which provides the occasion for judgment is progressively erased or redefined'.<sup>207</sup>

In the sentencing process, the accused's lack of intent may serve to so far remove the accused's moral responsibility from the act of killing her partner that a term of imprisonment is not deemed necessary.<sup>208</sup> As shown in Chapter Four, in these circumstances, the crime is constructed as a tragic event, for which the accused bears no responsibility. The tone of the narrative where a non-custodial sentence is imposed underlines the tragedy and pathos of the case. In *Varagnolo*, the case is said to be a 'great tragedy',<sup>209</sup> the accused's notification of the death of the deceased 'must have been a very traumatic moment for her',<sup>210</sup> and her life was 'sad and lonely',<sup>211</sup> and the 'deceased's death and her responsibility for it will be a burden that will remain with her, if not forever, certainly for many years to come'.<sup>212</sup> In *Roberts*, Hunt J referred to the 'poignant human circumstances of this case'.<sup>213</sup> His Honour addressed those who might suggest that the imposition of a recognisance was too lenient:

Look at the evidence before you speak and ask yourself what possible benefit to the prisoner or to the community would a term of imprisonment do in the circumstances which that evidence discloses?<sup>214</sup>

In these cases, there is a sense that the view was formed that these woman had suffered enough. The recognisance was compensation not only for the violence

<sup>206</sup> See H Allen, 'Rendering them Harmless', above n 157; H Allen, *Justice Unbalanced*, above n 157. See the comments in *Whalen*, unreported, CCA NSW, 5 Apr 1991 at 6 per Lee CJ.

<sup>207</sup> H Allen, 'Rendering them Harmless', *ibid* at 85.

<sup>208</sup> See also discussion at 4.2 and 4.4.

<sup>209</sup> Unreported, SC NSW, 21 Mar 1996 at 34 per McInerney J.

<sup>210</sup> Unreported, SC NSW, 21 Mar 1996 at 19 per McInerney J.

<sup>211</sup> Unreported, SC NSW, 21 Mar 1996 at 25 per McInerney J.

<sup>212</sup> Unreported, SC NSW, 21 Mar 1996 at 32 per McInerney J.

<sup>213</sup> Unreported, NSW SC, 1 Aug 1989 at 4.

<sup>214</sup> Unreported, NSW SC, 1 Aug 1989 at 16.



they had suffered from their partner, and its psychological impact upon them, but for the sum total of their 'sad life'.<sup>215</sup>

While lack of intent is clearly a relevant factor for the 'exceptional case' category in New South Wales, in other Australian jurisdictions there has been a greater willingness to impose non-custodial sentences in cases of provocation manslaughter. A non-custodial sentence (suspended sentence or probation) was imposed in six of the nine provocation manslaughter cases identified in Australian jurisdictions other than New South Wales.<sup>216</sup> However, as discussed at 8.3.4, in these provocation manslaughter cases, the focus on the accused's psychology means that issues of intention and the accused's (abnormal) state of mind at the time of the killing are reinvoked at the sentencing stage (even though the woman's conviction acknowledges an intention to kill).

#### 8.3.4 SENTENCING FOR PROVOCATION

In relation to the judicial understanding of domestic violence evident in sentencing comments, my contention is two fold. First, my argument has been that there has been a judicial failure to differentiate clearly between a response to domestic violence which is violent (and domestic in this sense) and 'domestic violence' properly called, that is the use of violence as a means of maintaining power and control.<sup>217</sup> Secondly, my consideration of the 'exceptional case' has shown that there is a failure to acknowledge the male violence directly in sentencing battered women who kill. In so far as it is acknowledged, this tends to be indirect and filtered through other factors. The judicial inability to directly recognise the seriousness of domestic violence as a grounds for mitigation is also unmistakable in cases where women have been convicted of manslaughter on the basis of provocation.<sup>218</sup>

---

<sup>215</sup> See also *Gardner*, unreported, SC NSW, 27 Mar 1992; *Kennedy* [2000] NSWSC 109; *Woolsey*, unreported, SC NSW, 19 Aug 1993.

<sup>216</sup> See 8.2.4.2 and the Appendix. This is also reflected in Table 8.1 where the median head sentence for provocation manslaughter and lack of intent manslaughter is substantially the same.

<sup>217</sup> See 8.3.2.

<sup>218</sup> See *Alexander* (1995) 78 A Crim R 141 at 144. This is an influential decision detailing the factors to be taken into account in sentencing in manslaughter provocation cases. See Chapter

### 8.3.4.1 Domestic violence as 'grave' provocation

In Australia, courts have recognised that 'very extreme and grave provocation' has considerable mitigating effect in the exercise of the sentencing discretion.<sup>219</sup> If the provocation is not regarded as grave, then a more severe sentence is warranted. Despite the history of violence in all of the 22 cases identified in my research where a female offender was sentenced for the offence of manslaughter on the ground of provocation in respect of killing her male partner,<sup>220</sup> there has been a failure to unambiguously recognise that domestic violence is 'grave' provocation. Instead, the inherent masculinity of the provocation defence resurfaces in the reliance on provocation as a factor relevant to the exercise of the sentencing discretion. As the defence of provocation protects the outrage of men in response to challenges to their sense of self-worth,<sup>221</sup> it is not surprising that challenges to the sexual integrity of a man have been considered to be 'grave' provocation such as to reduce the culpability of the offender at the sentencing stage.<sup>222</sup>

In the context of women who have killed their violent partner, there has not been the same unequivocal approval of the proposition that cumulative provocation in the form of domestic violence is grave provocation. Although some cases have referred to the history of violence as 'great' or 'extreme' provocation<sup>223</sup> or have said that the gravity of the provocation 'significantly reduced' the accused's culpability,<sup>224</sup> the general approach has been not to fully credit the objective gravity of the accused's experience of violence. A non-custodial sentence

---

Five for a consideration of the difficulties that battered women have encountered having their claims to provocation recognised.

<sup>219</sup> *Alexander* (1995) 78 A Crim R 141 at 142. Similarly, in England, the 'objectively judged gravity' of the provocation has been identified as an important factor in determining sentences in manslaughter/provocation cases, J Horder, 'Sex, Violence, and Sentencing in Domestic Provocation Cases' [1989] *Criminal Law Review* 546 at 546.

<sup>220</sup> See Table 1.1.

<sup>221</sup> See 5.3.3.2.

<sup>222</sup> K Warner, 'Sentencing the Violent Spouse', above n 2 at 113. See *Khan* (1996) 86 A Crim R 552 at 557 – 558 per Allen J, with whom Gleeson CJ and Sperling J agreed. A similar approach is evident in England, see S Edwards, "'Provoking her Own Demise": From Common Assault to Homicide', in J Hanmer & M Maynard (eds), *Women, Violence and Social Control*, London: Macmillan, 1987 at 165.

<sup>223</sup> *King*, unreported, SC NSW, 13 Aug 1998; *Gilbert*, unreported, SC WA, 4 Nov 1993.

<sup>224</sup> *Simon*, unreported, SC NSW, 21 Jul 1995.

(probation, suspended sentence or recognisance) was imposed on 6 of the 22 female offenders convicted of provocation manslaughter.<sup>225</sup> However, instead of focusing on the gravity of the provocation – the domestic violence – as an explanation for the mitigation of sentence, the usual approach was to reconstruct the mitigating factors as personal psychological factors of the accused – BWS<sup>226</sup> or another psychological problem, such as depression.<sup>227</sup>

In only one of these six cases was the behaviour of the accused's partner directly identified as the factor warranting a sentence other than an immediate custodial sentence, and this was a case where the provocative conduct was directed towards the daughter of the accused. In *M*, the accused's partner had ordered her to bring their daughter and dog into the bedroom, so that the daughter could perform oral sex on the dog. This request was viewed against a background where the daughter had been sexually assaulted (including anally raped) over a number of years, and he had 'behaved violently and tyrannically towards' the accused. In sentencing the accused to five years imprisonment with a non-parole period of three years, suspended on condition that the accused be of good behaviour for three years, Johnston J did not place 'nearly so much importance' on the deceased's conduct towards the accused as she was an 'adult, [she] had chosen the man ... [and] must have bargained for that to some extent although not the extent that was later disclosed'.<sup>228</sup>

#### 8.3.4.2 *Psychological provocation*

In five of six provocation manslaughter cases where a sentence other than an immediate custodial sentence was imposed, the focus was on the accused's (dysfunctional) psychology<sup>229</sup> rather than the gravity of the provocation as the basis for mitigation. This reflects the approach to battered women's claims to the

<sup>225</sup> See 8.2.4.2.

<sup>226</sup> *Gilbert*, unreported, SC WA, 4 Nov 1993; *Bradley*, unreported, SC Vic, 14 Dec 1994; *Taylor*, unreported, SC SA, 16 Jun 1993; *Denney* [2000] VSC 323.

<sup>227</sup> *Gardner*, unreported, SC NSW, 27 Mar 1992.

<sup>228</sup> *M*, unreported, SC SA, 31 Jan 1986 at 5.

<sup>229</sup> See *Gardner*, unreported, SC NSW, 27 Mar 1992: recognisance; *Gilbert*, unreported, SC WA, 4 Nov 1993: three years probation and 150 hours community service; *Denney* [2000] VSC 323: three year suspended sentence; *Bradley*, unreported, SC Vic, 14 Dec 1994: three year suspended sentence; *Taylor*, unreported, SC SA, 16 Jun 1993: five year suspended sentence.

provocation defence found in my analysis of the substantive law.<sup>230</sup> The psychologisation of women's responses to violence is an effective strategy to reduce the accused's moral responsibility at the sentencing stage, even if a woman's conviction acknowledges the existence of an intention to kill (for example, manslaughter on the basis of provocation). This focus on the accused's psychology allows intention to be reinvoked at the sentencing stage, 'in terms which both displace the material significance of the offence and attenuate the offender's moral responsibility for it'.<sup>231</sup> However, the result is that the mitigatory role of the history of violence is obscured and diminished.

A useful illustration of the shift from the recognition of the violence to the accused's psychology is found in *Taylor*, and in order to convey the contrast, I recount the facts in some detail. In this case, the accused shot her husband, and her plea of guilty to manslaughter on the ground of provocation or alternatively excessive self-defence was accepted by the Crown.<sup>232</sup> On the night of the killing, the accused had told her husband that there was not any Cranberry sauce or Strawberry jam to have with his pork, but he was offered plum jam instead. He went 'berserk'. The accused had been punched, kicked and half strangled by her husband, and she had been left lying on the floor in a state of considerable distress. He then ate his dinner, and then beat her again. The accused went upstairs and loaded her husband's rifle. She shot her husband while he was watching television. There was medical evidence to corroborate the accused's account that on the night of the killing, she had been the victim of the major assault.

These events were placed against a history of violence towards the accused by her husband extending over the last 10 – 15 years of the relationship. Olsson J comments that '[i]t is impossible ... adequately to describe the conduct to which you were exposed over the course of many years'.<sup>233</sup> His Honour stated that she

---

<sup>230</sup> See 5.5.

<sup>231</sup> H Allen, 'Rendering them Harmless', above n 157 at 84.

<sup>232</sup> It is noted that the defence of excessive self-defence no longer exists in most Australian jurisdictions, see 6.3.3 and S Bronitt & B McSherry, *Principles of Criminal Law*, Sydney: LBC Information Services, 2001 at 302 - 304.

<sup>233</sup> Unreported, SC SA, 16 Jun 1993 at 5.

was 'constantly subjected to various forms of cruel and violent blows or manhandling at the instance of [her] husband, on many occasions for the most trivial of reasons and because he was in an ugly and intoxicated mood'.<sup>234</sup> The accused had previously left her husband and obtained a restraining order as he was 'virtually uncontrollable' at that time. The accused returned to assist her husband look after his terminally ill father, and on his promise that he would stop drinking and reform. The reformation of the accused's husband was short-lived. They moved to an isolated country community, and he resumed his violent and irrational behaviour. The accused was almost totally isolated and living in a continuing nightmare-like environment. She had no money, no friends nearby, and she could not drive. Her husband's behaviour when intoxicated, was brutal as it was unpredictable and irrational. He made sexual demands on the accused which she dared not refuse.

Despite the lengthy account of the violence (both physical and psychological) inflicted on the accused by her husband and the violent assault that precipitated her fatal act, the accused's fatal violence was attributed to her BWS. This means that at the sentencing stage the legal response is based on the accused's psychology. The account of the deceased's violence is interposed by details of the accused's pathology, as a sufferer of BWS. As a sufferer of an acute form of BWS, this is taken to explain the accused's hazy recollection of the circumstances causing death, her perception of the immediacy and degree of danger she faced, her perceived lack of options, and aspects of her loss of self-control and proportionality of response. The explanation of her action in terms of her perception as a sufferer of BWS renders her responses excessive, 'difficult for the ordinary person to appreciate', and as Olsson J says, '[i]n short, [the] condition has a fundamental effect on the normal reasoning processes of the sufferer'.<sup>235</sup> The accused is made the subject for treatment. She must recover from her BWS, and:

---

<sup>234</sup> Unreported, SC SA, 16 Jun 1993 at 5.

<sup>235</sup> Unreported, SC SA, 16 Jun 1993 at 13.

Even with appropriate treatment it will be a substantial time before you are fully rehabilitated; and the process of rehabilitation is said not really to be practical in a custodial environment.<sup>236</sup>

And in this interpolation of psychological dysfunction, the potency of the deceased's violence is lost. The accused was sentence to a term of imprisonment of five years with a non parole period of two years, wholly suspended.

The utility of psychological dysfunction is to 'to diminish the offender's guilt by reducing her level of responsibility for the conduct ... by depicting the offender's psychological problem as rendering her behaviour irrational, unthinking or unintentional'.<sup>237</sup> The focus on the accused's psychology stands against evidence of premeditation that is typically an aggravating factor.<sup>238</sup> As well, it may obscure evidence of concealment of responsibility which would usually weight against possible mitigatory factors such as contrition, remorse and co-operation.<sup>239</sup> This can be seen in the case of *Denney*, where the accused shot her husband after he had fallen asleep, and then concealed her involvement in the crime for 13 years. However, contrary to what knowledge of these facts might suggest as an appropriate sentence, the accused was sentenced to a wholly suspended term of imprisonment of three years.

The psychological impact on the accused of her husband's violence, together with the psychological damage that had been caused to the accused by concealing the crime meant that a suspended sentence was considered appropriate. Coldrey J considered that, '[t]he conduct giving rise to this shooting was humiliating, degrading and violent, The aftermath of that shooting, spanning 15 years, has left you with devastating physical and psychological damage' and 'for the reasons I have outlined, I propose to give you the opportunity to re-establish your life without undergoing any actual imprisonment'.<sup>240</sup> As well as the psychological damage caused by her husband's violence, the 'physical and psychological toll of harbouring the secret of [her] husband's death, has been

<sup>236</sup> Unreported, SC SA, 16 Jun 1993 at 13.

<sup>237</sup> T Henning, above n 2 at 306.

<sup>238</sup> See R Fox & A Freiberg, above n 11 at 3.616.

<sup>239</sup> See *ibid* at 3.8.

<sup>240</sup> [2000] VSC 323 at [37], [39] per Coldrey J.

immense. It has in itself constituted a severe punishment for [her] actions'.<sup>241</sup> The credibility of the accused's version was bolstered by the evidence that the accused was suffering from BWS at time she killed the deceased, or at a minimum had 'learned helplessness', that explained her concealment of the abuse.<sup>242</sup>

While the basis of mitigation was the psychological damage caused to the accused by her husband's violence, an alternative (and preferable) approach to sentencing would have been to acknowledge the violence as a mitigating factor, and to recognise the self-defence aspects of the accused's conduct. The accused's husband was a violent and jealous man who had frequently assaulted the accused. Early in the relationship, the accused had unsuccessfully attempted to leave him. He assaulted her and told her that 'he would never let [her] go and said that if [she] left him, he would kill [her]'. This was a theme he returned to frequently in the ensuing years'.<sup>243</sup> He also made demands for sex to which the accused acquiesced to prevent violence to their children and to herself. As well as inflicting physical and verbal abuse on the accused, the accused was totally dependent on her husband for household finances, as he controlled the family finances as a demonstration of his power and control.<sup>244</sup> He did not provide the accused with enough money to cover expenses and she had obtained loans.

On the day of the killing, the accused had confessed to her husband about the debts she had incurred. He was very angry and struck her a couple of times. At this point, the accused mentioned that she had borrowed a gun from a friend for her husband's use on a hunting expedition. The accused had borrowed the gun to appease her husband's anticipated anger in respect of the loans. He then 'lost it'. He called her a 'stupid bitch' and said that he always knew that she was worthless and threatened to kill her. He said that 'you're only good for one thing' and then pushed her 'into the bedroom and while seething with anger, he

---

<sup>241</sup> [2000] VSC 323 at [33] per Coldrey J.

<sup>242</sup> One forensic psychiatrist gave evidence that the accused was suffering BWS at the time she killed her husband. The other expert considered that she was chronically depressed but did not fit within the 'paradigm of battered woman syndrome'. He did agree that she had a 'state of learned helplessness' as a result of the abuse.

<sup>243</sup> [2000] VSC 323 at [7] – [8] per Coldrey J.

violently raped [her]'.<sup>245</sup> It was accepted that the accused felt fearful, degraded, humiliated and angry, and that the intensity of her husband's anger was such that she was terrified that he would kill or seriously harm her.

Although the accused's defence of self-defence was rejected at trial, these facts extracted from the sentencing comments of Coldrey J reveal the possibility that the accused's act of killing her husband was motivated by self-preservation. In my view, this ought to have been recognised as mitigating per se, without the need to interpose the accused's psychology.<sup>246</sup> In any event, the facts that formed the basis for the imposition of sentence ought to have been classified as objectively serious provocation – 'grave' provocation. The coupling of the defence of provocation based on serious and sustained domestic violence with the woman's psychological deficiencies serves to individualise and psychologise the provocation plea. The better approach is to 'acknowledge the violent background to the offence as violence and to mitigate the offender's sentence on that basis without reconstructing the violence as the offender's psychological problem'.<sup>247</sup>

### 8.3.5 ABORIGINALITY

In the sentencing comments identified in my research, ten of the women who had killed their male partner were recognised by the sentencing judge as being Aboriginal women.<sup>248</sup> Of these ten women, nine women were convicted of manslaughter (one on the grounds of provocation<sup>249</sup> and eight on the grounds of

<sup>244</sup> [2000] VSC 323 at [17] per Coldrey J.

<sup>245</sup> [2000] VSC 323 at [20] per Coldrey J.

<sup>246</sup> See 8.4.2.

<sup>247</sup> T Henning, above n 2 at 318.

<sup>248</sup> This does not exclude the possibility that other women were Aboriginal women, however their Aboriginality was not mentioned in the sentencing comments. It is noted that criticism has been directed at judges for failing to acknowledge the racial identity of the accused in cases where women kill their male partners, see J Stubbs & J Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on the Battered Woman Syndrome' (1999) 23 *Melbourne University Law Review* 709 at 746; S Noonan, 'Battered Woman Syndrome: Shifting the Parameters of Criminal Law Defences (or (Re) Inscripting the Familiar?)', in A Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law*, London: Cavendish Publishing Limited, 1996 at 207; J Stubbs & J Tolmie, 'Race, Gender and the Battered Woman Syndrome: An Australian Case Study' (1995) 8 *Canadian Journal of Women and Law* 122.

<sup>249</sup> *Gilbert*, unreported, SC WA, 4 Nov 1993.



lack of intent)<sup>250</sup> and one woman was convicted of murder.<sup>251</sup> In a previous study of sentencing comments in intimate homicide cases between 1989 and 1990 in New South Wales and Victoria, Easteal found that Aboriginality was a variable that tended to reduce the sentence imposed on women who killed their male partner.<sup>252</sup> My research supports this finding. I found that a non-custodial sentence (a recognisance,<sup>253</sup> probation<sup>254</sup> or suspended sentence)<sup>255</sup> was imposed in six out of the nine cases of manslaughter cases. These sentencing outcomes support the view that, in cases of intimate homicide involving female offenders, Aboriginality is a variable that operates favourably for an accused in the exercise of the sentencing discretion.

However, my research suggest that leniency is contingent on the positioning of the accused within the negative stereotype of the helpless victim, and that current representations of Aboriginal women make the law receptive to such a claim of victim status.<sup>256</sup> In other words, the imposition of a lenient sentence is dependent on the representation of the accused as subordinate and victimised. Sympathy has been extended to Aboriginal women who kill their partners because of the overall sum of their 'sad life' and not just the violent relationship with their partner.<sup>257</sup> The accused is presented as a 'double victim' – a victim of her partner's violence and a victim of society. For example in *Brauer*, in suspending

---

<sup>250</sup> *Brauer*, unreported, SC SA, 16 Feb 1988; *Kennedy* [2000] NSWSC 109; *Varagnolo*, unreported, SC NSW, 21 Mar 1996; *Billeley*, unreported, SC SA, 31 Jul 1987; *Roberts*, unreported, SC NSW, 1 Aug 1989; *Moore*, unreported, CCA NSW, 16 Jun 1998; *Rigney*, unreported, SC SA, 21 May 1996; *Buzzacott*, unreported, SC SA, 21 Jul 1993.

<sup>251</sup> *Bourke* [2000] NSWSC 356.

<sup>252</sup> P Easteal, *Killing the Beloved*, above n 2 at 131 – 132, 134.

<sup>253</sup> *Kennedy* [2000] NSWSC 109; *Varagnolo*, unreported, SC NSW, 21 Mar 1996; *Roberts*, unreported, SC NSW, 1 Aug 1989.

<sup>254</sup> *Gilbert*, unreported, SC WA, 4 Nov 1993.

<sup>255</sup> *Brauer*, unreported, SC SA, 16 Feb 1988; *Billeley*, unreported, SC SA, 31 Jul 1987.

<sup>256</sup> See J Stubbs & J Tolmie, 'Race, Gender and the Battered Woman Syndrome', above n 248.

<sup>257</sup> See also *Varagnolo*, unreported, SC NSW, 21 Mar 1996. In *Kennedy* [2000] NSWSC 109 reference is made to the effect on the accused of her mother's violence and rejection, as well as her partner's violence. In *Burke* [2000] NSWSC 356, James J refers to the accused's tragic personal circumstances, including removal from her mother's home, her violent relationship with a previous partner, and the violence inflicted on her by the deceased: '[t]he prisoner's personal history reveals a history of unrelenting tribulation and harshness which is most difficult for most people to comprehend. She is a person who has existed in socially deprived circumstances ... consigned to a lifestyle of poverty, deprivation and entrenched alcohol abuse in an atmosphere where she is the subject of violence and conditioned to violence as a social response', at [43]. In

the accused's sentence, the accused's act of stabbing her partner was viewed in the context of his physical and verbal abuse. It was also viewed against the wider background of the accused's neglect by her mother as a child, the sexual abuse by her foster father, her institutionalisation and then 'release... back to a drunken home'.<sup>258</sup> Johnson J noted that her living conditions had been very poor and that she sometimes slept in a shed at the back of her mother's house and sometimes in car. He recognised the accused's long exposure to a 'disturbed and deprived situation' and that she had 'lived a most difficult, deprived life, on the edge of society'.<sup>259</sup> There was obvious sympathy for her difficult existence and a sense that the sentence imposed was a consolation for the appalling events of her life.

An interesting feature of *Brauer* was the treatment of the accused's alcohol consumption. While the consumption of drugs and alcohol by a woman has often meant that she tended to be viewed as a participant in a dysfunctional relationship (rather than the victim of violence),<sup>260</sup> the consumption of alcohol by an Aboriginal woman was not necessarily injurious to her claim for sympathy and a lenient sentencing outcome.<sup>261</sup> In some cases, the accused's drinking was viewed as further evidence of her 'victimisation' by her partner and her social environment, and not as evidence of her status as an equal partner in the violence. In *Brauer*, Johnson J commented that:

The picture that I have is – whether I am right or not I cannot be sure – but the picture is that ... you for long periods have been placed in a situation where alcohol was the order of the day and there was pressure on you to drink, and you did.<sup>262</sup>

The accused's responsibility (and blameworthiness) for her alcohol consumption was removed. Similarly, in *Kennedy* the accused's use of alcohol was explained by her difficult situation:

---

*Roberts*, unreported, SC NSW, 1 Aug 1989 reference is made to the 'poignant human circumstances in this case', at 4 per Hunt J.

<sup>258</sup> Unreported, SC SA, 16 Feb 1988 at 7.

<sup>259</sup> Unreported, SC SA, 16 Feb 1988 at 5.

<sup>260</sup> See 6.3.3.2.

<sup>261</sup> However see *Moore*, unreported, CCA NSW, 16 Jun 1998. This case is discussed at 8.3.3.2.

<sup>262</sup> Unreported, SC SA, 16 Feb 1988 at 2.

The prisoner did not drink when she met the deceased, but she began to do so. I think that this was because it tended to make the behaviour of the deceased easier to bear and perhaps to help her to forget.<sup>263</sup>

This explanation displaces the accused's responsibility for her alcohol abuse, and so the accused is not blamed for her intoxication contributing to the fatal situation.<sup>264</sup> In this case, the act of stabbing her partner was not attributable to a 'drunken argument' but to her legitimate fear of further violence.

In sentencing Aboriginal women who kill their male partners, there was recognition of the broader context of their social and economic environment – the deprived social conditions, and the prevalence of alcohol abuse and violence.<sup>265</sup> However, use of alcohol aside, the favourable treatment of Aboriginal women appears to be dependent on their maintaining the standards of white, middle class femininity in the midst of a deprived social environment. In *Varagnolo*<sup>266</sup> and *Roberts*<sup>267</sup> reference was made to their membership of a church and their religious involvement. As discussed at 8.3.3.2, in *Varagnolo* the accused's housekeeping skills, the way she dressed and her ability as a mother were all the subject of favourable comment. The centrality of the accused's status as a 'good' mother was also seen in *Roberts* and *Kennedy*. In *Brauer*, there

<sup>263</sup> [2000] NSWSC 109 at [21] per Barr J.

<sup>264</sup> See *Burke* [2000] NSWSC 356, where it was stated that 'in the circumstances of social deprivation and personal abuse she has experienced, it is not surprising that she had turned to the lifestyle in which she was involved at the time of the commission of this offence', at [12] per James J. In *Billeley*, unreported, SC SA, 31 Jul 1987, Johnson J stated that '[i]t is very difficult to speak about the conditions in that camp and the conditions to which your people have, in many cases, been reduced. It is a matter of history, and it is no good talking about individuals at this stage, but you are a victim of something which has happened over a long period of time', at 2. The accused had been convicted of manslaughter following a trial by judge alone of manslaughter. Johnston J considered that the Crown could not prove the intent for murder beyond reasonable doubt, due to the accused's state of intoxication.

<sup>265</sup> More generally, it is noted that in the exercise of the sentencing discretion, there has been recognition that the social and economic disadvantages faced by Aboriginal people may be taken into account as a mitigating factor. Aboriginality is not a mitigating or aggravating factor per se. However, 'in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group', *Neal* (1982) 149 CLR 305 at 326 per Brennan J. The court must take into account matters 'which are mitigating factors applicable to the particular offender. These include, social, economic and other disadvantages which may be associated with or related to a particular offender's membership of the Aboriginal race', *Rogers* (1989) 44 A Crim R 301 at 307 per Malcolm CJ. See generally, R Fox & A Freiberg, above n 11 at 3.716.

<sup>266</sup> Unreported, SC NSW, 21 Mar 1996.

<sup>267</sup> Unreported, SC NSW, 1 Aug 1989.

was reference to that 'way in which [she] keep[s] herself and present[s] herself on the street, and the way that [she] look[s] after [her] children'.<sup>268</sup> In considering the question of public safety, Johnson J considers that she is 'not violent by disposition, indeed rather the opposite.... All the material before me concerning your relationship to your children speaks of a caring and responsible mother'.<sup>269</sup> In *Gilbert*, Scott J states that 'I'm giving you this opportunity, really, so that you can go back to your children and carry on with your responsibility of being a mother and look after your children'.<sup>270</sup>

The significance of the accused's ability to function in such a difficult environment as revealing her agency and her ability to cope is dissipated when discussion turns to her attempts to deal with her partner's violence. In explaining the accused's responses to her partner's violence, the dominant approach has been the model of psychological dysfunction.<sup>271</sup> At the sentencing stage, sympathy requires identification with victim status and so weight is only given to the stories of Aboriginal women where they 'converged with the psychological discourse of dependency, passivity and inability. In turn, this psychological discourse fits best with a legal discourse emphasising victimisation'. This means that 'ironically, therefore, ... status as victim was derived from [their] own alleged personal inadequacies rather than in acknowledgment of the violence that was inflicted upon [them]'.<sup>272</sup>

In *Gilbert*, the accused thought that her partner was going to attack her and she stabbed her violent partner after picking up a knife to scare him. The accused had attempted to escape from her partner's violence previously. She had left her husband on several occasions. However, he had pursued her and 'virtually

<sup>268</sup> Unreported, SC SA, 16 Feb 1988 at 5 per Johnson J.

<sup>269</sup> Unreported, SC SA, 16 Feb 1988 at 7 per Johnson J.

<sup>270</sup> Unreported, SC WA, 4 Nov 1993 at 39.

<sup>271</sup> See discussion of *Varagnolo*, unreported, SC NSW, 21 Mar 1996; *Roberts*, unreported, SC NSW, 1 Aug 1989; *Kennedy* [2000] NSWSC 109 at 8.3.3. See also Chapter Seven for a discussion of BWS.

<sup>272</sup> J Stubbs & J Tolmie, 'Race, Gender and the Battered Woman Syndrome', above n 248 at 157. These comments are made by Stubbs and Tolmie in the context of their discussion of *Hickey*, unreported, SC NSW, 14 Apr 1992, where the accused was acquitted on the ground of self-defence, based on BWS. However, in my view these comments are equally apt to the cases where Aboriginal women are convicted of manslaughter in respect of killing their male partner.

compelled [her] to return'.<sup>273</sup> He was 'a very strong man, considerably stronger than [her]'. It was observed that '[o]ther people had been powerless to stop his continued violence'.<sup>274</sup> In view of the steps that the accused had taken to avoid her partner's violence, and the evidence of the lack of options available to her, it is surprising that evidence of BWS was necessary to explain her inability to resist her violent partner's attacks.<sup>275</sup> Instead of acknowledging the relevance of the practical barriers that contributed to the accused's decision to take up a knife against her physically stronger partner, Scott J says that:

[She] had reached the situation where life for [her] had become almost unendurable, bearing in mind the constant nature of the attacks upon [her] and the emotional prison in which [she] found herself trapped.<sup>276</sup>

The accused's response to her partner's violence was explained in terms of her abnormal emotional state – her apathy and her learned helplessness – rather than the objective circumstances that existed.

In sentencing Aboriginal women who killed their violent partner, there is awareness of the broader social context in which these women are acting. As I have mentioned, there are sympathetic references to their sad and deprived lives. However, there has been a failure to appreciate what these circumstances of disadvantage and racism might mean for Aboriginal women's self-defence claims. The failure to acknowledge the particularity of the circumstances in which Aboriginal women seek to negotiate solutions to domestic violence and the cultural context in which the violence occurs means that the 'reality' for Aboriginal women is not recognised within the legal system.<sup>277</sup> The availability of options to Aboriginal women in their attempts to deal with the violence have generally not been viewed in the 'context of the connections [Aboriginal women] have with their communities, the economic and social disadvantages they

<sup>273</sup> Unreported, SC WA, 4 Nov 1993 at 36.

<sup>274</sup> Unreported, SC WA, 4 Nov 1993 at 36.

<sup>275</sup> It is noted that the defence counsel has in hindsight questioned the wisdom of using BWS evidence in a case like *Gilbert*: see J Stubbs & J Tolmie, 'Battered Woman Syndrome in Australia: A Challenge to Gender Bias in the Law?', in J Stubbs (ed), *Women, Male Violence*, Sydney: The Institute of Criminology, 1994 at 208.

<sup>276</sup> Unreported, SC WA, 4 Nov 1993 at 37.

<sup>277</sup> See discussion in 2.6.4, 7.4.1.3 and 7.4.2.3.

experience and the racism of the wider community'.<sup>278</sup> There has been a failure to acknowledge the difficulties that Aboriginal women have experienced in accessing support services, the issues of racism that have underpinned the relationship between Aboriginal women and government authorities, including police officers,<sup>279</sup> the historical framework of colonisation, and the 'range of pressures to remain silent on family violence issues in the interests of community and family'.<sup>280</sup>

## 8.4 TOWARDS A PRINCIPLED APPROACH TO SENTENCING BATTERED WOMEN WHO KILL

### 8.4.1 ABOLITION OF MANDATORY PENALTIES

The focus on my discussion in this chapter has been upon the exercise of the sentencing discretion where women have been convicted of murder or manslaughter in respect of killing their male partner. However, special comment must be made of those jurisdictions that retain mandatory life imprisonment as the penalty for murder. My recommendation is that mandatory sentencing for murder be abolished.<sup>281</sup> The usual objection to the abolition of the mandatory life penalty is that the penalty is 'necessary to reflect the gravity of the crime and society's abhorrence of murder'.<sup>282</sup> Murder is considered the most heinous crime and concerns have been expressed that the removal of the mandatory life penalty would appear 'to equate murder and other offences such as rape and burglary, by

<sup>278</sup> J Stubbs & J Tolmie, 'Race, Gender and the Battered Woman Syndrome', above n 248 at 131.

<sup>279</sup> As Astor notes, '[t]he law has been an instrument in the oppression of Aboriginal people far more than it has been a resource from them', H Astor, 'Mediation Initiatives and the Needs of Aboriginal Women', in D Bagshaw (ed), *Second International Mediation Conference: Mediation and Cultural Diversity Conference Proceedings*, Adelaide: University of South Australia, 1996 at 13.

<sup>280</sup> H Blagg, *Crisis Intervention in Aboriginal Family Violence: Summary Report*, Canberra: Commonwealth of Australia, 2000 at 9.

<sup>281</sup> For a recent consideration of the arguments in favour of discretionary sentence and the arguments against, see New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants*, Report 73, Wellington 2001 at 49 – 53. See also Taskforce on Women and the Criminal Code, *Taskforce on Women and the Criminal Code Report of the Task Force on Domestic Violence to the Queensland Government*, Report, Brisbane: Department of Justice and Attorney-General, 2000 at 204 – 209.

<sup>282</sup> See New Zealand Law Commission, *ibid* at 51. See also Taskforce on Women and the Criminal Code, *ibid* at 208.

providing the same maximum penalty'.<sup>283</sup> However, such an argument fails to recognise the varying degrees of culpability that may attach to a murderer.<sup>284</sup> It also fails to recognise that in some circumstances murder is 'not necessarily more heinous than any other crime' – for example, 'a premeditated armed robbery for financial gain during which the offender deliberately causes grievous bodily harm may be considered more heinous than a mercy killing'. In my view, the crime of a battered woman who kills her partner is also not as heinous as that of an armed robber who intentionally inflicts grievous bodily harm.

While I acknowledge that the abolition of mandatory penalties alone cannot improve the response of the criminal justice system to battered women who kill, my position is that the existence of mandatory sentencing unduly increases the stakes for women who choose to rely on self-defence as a strategy at trial for murder.<sup>285</sup> Mandatory sentencing makes reliance on self-defence to murder a high-risk strategy, as this is an all or nothing approach - acquittal or a conviction for murder with life imprisonment. When compared to the discretionary sentencing regime that exists for manslaughter, mandatory sentencing for murder makes compromise options such as a combined defence (for example, reliance on provocation and self-defence) or a plea of guilty to manslaughter potentially attractive alternatives to reliance only on self-defence at trial.<sup>286</sup> In other words, the enormity of the penalty for murder means that women may choose not to rely on self-defence at trial.<sup>287</sup>

The development of Australia's legal approach to battered women who kill their abusive partners has relied heavily on the literature and case law of the United

<sup>283</sup> Taskforce on Women and the Criminal Code, *ibid* at 208.

<sup>284</sup> See New Zealand Law Commission, above n 281 at 50 – 52; Taskforce on Women and the Criminal Code, *ibid* at 204.

<sup>285</sup> See E Sheehy, above n 120.

<sup>286</sup> It is acknowledged that sentencing considerations are not the only factors relevant to an accused's decision to proceed to trial, see 6.4. However, the abolition of mandatory sentencing is important as 'no other criminal law reforms or criminal justice policies can shift the power balance so as to ensure a fair opportunity to women to have their legitimate claims to self-defence adjudicated', *ibid*. See also L Ratushny, *Self-Defence Review*, Canada: Minister for Justice, 1997; E Sheehy, 'Review of the Self-Defence Review' (2000) 12 *Canadian Journal of Women and Law* 197.

<sup>287</sup> E Sheehy, above n 120.

States and Canada.<sup>288</sup> However, in seeking to emulate the approach in these jurisdictions, it is important to take into account the enormous pressure that the mandatory life sentence for murder places on the 'defences to achieve what mitigation of sentence might otherwise accomplish'.<sup>289</sup> The abolition of mandatory sentencing ameliorates the enormity of the risk in relying on self-defence at trial and may encourage women to advance the defence at trial.

Discretionary sentencing for murder also enables the law to be sensitive to the legitimate claims of battered women. And until the paradigm conception of self-defence has evolved to recognise women's self-defence claims, there is scope for discretionary sentencing to fill the void. In so doing, my argument is that the sentences imposed for murder should reflect the self-defensive aspects of the killing. There exists opportunity for clear judicial statements to be made that distinguish between domestic violence as a means of establishing and maintaining control in a relationship and the circumstances where women kill in response to domestic violence.<sup>290</sup> Judges should take the opportunity to observe the mitigating role of the history of domestic violence and the woman's motivation to kill. Perceptive comments could be made in relation to the gendered nature of the law of self-defence, and in this way, sentencing judges could take advantage of their ability to influence and shape the norms of the criminal law.<sup>291</sup>

#### 8.4.2 SENTENCING WITHIN A DISCRETIONARY FRAMEWORK

Although I have expressed concerns about the current approach to sentencing battered women who kill based on the concept of mercy in the 'appropriate case',<sup>292</sup> my view is that the compassion and sympathy that inform the merciful approach can be used positively to improve the position of these women within the criminal justice system. The operation of mercy at the sentencing stage may help to address deficiencies in the substantive criminal law of self-defence as it

<sup>288</sup> See Chapter Seven in relation to BWS. See J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 248.

<sup>289</sup> E Sheehy, above n 120.

<sup>290</sup> See 8.3.2.

<sup>291</sup> See further at 8.4.2.



applies to battered women who kill. The significant historical role that mercy can play is seen in the acceptance of the defences of self-defence, necessity, insanity, and infancy, as these were 'recognised grounds for leniency and executive clemency long before they became grounds for an acquittal'.<sup>293</sup> Mercy is able to assist in the emergence and acceptance of new or enlarged substantive defences:

Because the practice of mercy allows for powerful extra-judicial considerations to come into play at the sentencing stage, such as allowing extreme disadvantage and hardship to be recognised as an excusing factor when the substantive law does not, over time it can create a climate which is conducive to the acceptance of new defences and other important distinctions in the substantive law.<sup>294</sup>

Fox considers that this 'evolutionary process is currently visible in the claims for ... enlarged substantive defences to apply to ... killings by abused and battered women'.<sup>295</sup> While I agree that the operation of mercy at the sentencing stage has the potential to facilitate access to self-defence by battered women by enlarging the application of the defence, my contention is that for mercy to have this positive and meaningful impact on the development of the law, judges must be more explicit about the basis on which mercy is truly deserved.

The current approach to sentencing battered women indicates that while the judiciary are no doubt sympathetic to the situation of battered women, there is ambivalence about the basis on which mitigation is appropriate. Although the factual account of the circumstances of the killing often reveals the judge's appreciation of the relevance of the history of violence in the imposition of sentence, there appears to be a reluctance to directly acknowledge the violence of the deceased as a mitigating factor. Currently in adopting a merciful approach to the sentencing of women who kill their violent partners (as noted at 8.3.3) judges have taken care to stress the unique and unusual circumstances of the cases where non-custodial sentences are imposed. This means that the imposition of

<sup>292</sup> See 8.3.1.3.

<sup>293</sup> R Fox, 'When Justice Sheds a Tear', above n 80 at 8. See also Walker who argues that 'the less common, but more significant function of mercy is as a catalyst for the creation of new precedents for leniency, particularly ones based on ethical, practical or humanitarian considerations rather than fixed rules', N Walker, above n 81 at 35 – 36.

<sup>294</sup> R Fox, 'When Justice Sheds a Tear', *ibid.*

<sup>295</sup> *Ibid.*

lenient sentences rests on notions of individualised claims to sympathy and compassion dependent on the accused's ability to conform to stereotyped notions of the 'appropriate victim'. Such a case by case approach allows mercy to be extended in the individual 'deserving' case, while ignoring the broader structural disadvantages that women face within the criminal justice system.<sup>296</sup>

One possible reason for this judicial approach may be a concern not to infringe the fundamental rule that a judge is not entitled to sentence an accused on a basis inconsistent with the jury's verdict or the plea.<sup>297</sup> If an accused has unsuccessfully relied on self-defence at trial or if the accused has pleaded guilty to manslaughter or murder (negating all possible defences including self-defence),<sup>298</sup> then the sentencing judge cannot sentence on the basis that the accused was acting in lawful self-defence. In these circumstances, the imprecise nature of mercy makes it a useful device to avoid the possibility of a Crown appeal.<sup>299</sup>

A second explanation for the merciful approach may be judicial discomfort created by the recognition of the leniency that attaches to the circumstances in which the battered woman killed, while at the same time not being seen to devalue human life. In adopting the concept of mercy, judges have taken care not to devalue the seriousness of the accused's actions.<sup>300</sup> There are frequent references in the cases (especially cases where non-custodial sentences are imposed) to the need to uphold the sanctity of human life. An example is found in *Bradley*, where Coldrey J, in imposing a suspended sentence, stated that:

---

<sup>296</sup> This has been observed by Strange who comments that 'relying on mercy is to give the state a perfect excuse to leave structural injustice unaddressed', C Strange, 'Introduction', in C Strange (ed), *Qualities of Mercy: Justice, Punishment, and Discretion*, Vancouver: UBC Press, 1996 at 17.

<sup>297</sup> See 8.2.1.

<sup>298</sup> *Schugman v Menz* [1970] SASR 374.

<sup>299</sup> See *Federal Court of Australia Act 1976* (Cth) ss 24, 25; *Criminal Appeal Act 1912* (NSW) s 5D; *Criminal Code* (NT) s 414; *Criminal Code* (Qld) s 669A; *Criminal Law Consolidation Act 1935* (SA) s 352(2); *Criminal Code* (Tas) s 401(2); *Crimes Act 1958* (Vic) s 576A; *Criminal Code* (WA) s 688(2).

<sup>300</sup> See 8.3.1.2.

There is no right to take the life of a person because their conduct is outrageous and despicable. Courts must be careful not to appear to condone vigilante actions or to suggest that self-help in eliminating the problem of a battering male is legally acceptable.<sup>301</sup>

His Honour was concerned to stress that the 'courts should not appear to condone, and should endeavour to deter, violence as a problem solving technique. The courts must also be seen to uphold the sanctity of human life'.<sup>302</sup> The judicial dilemma appears to be that if a woman receives a reduced sentence on the basis of the circumstances of the killing, then this sentence appears to devalue human life, and so the woman's actions need to be condemned to reaffirm the sanctity of human life.

The judicial aversion to valuing human life differently for the purposes of sentencing for homicide (that is, a life is a life) may incline judges to avoid confronting the deceased's violence directly as a basis for mitigation.<sup>303</sup> This concern is clearly seen in *Varagnolo*, where McInerney J stressed that 'it was not my purpose in these reasons for sentence to condemn or indeed to pass judgment on the deceased'.<sup>304</sup> In seeking to quarantine the sentence imposed from any suggestion that the deceased's life had less value, the judges appear to be shying away from what the deceased has done, and instead focus on its impact on the woman's psychology.

While these may be valid concerns, my argument is that if the motivation for the imposition of non-custodial sentences in cases of battered women who kill is an acceptance of the inadequacy of the existing substantive law, and/or the previous violence that has been inflicted by the deceased on the accused, then this needs to be made clear by the judge. The ground for mitigation should be clearly recognised as the woman's expression of self-preservation and/or the history of violence that she has endured. And, while conceding that this may be a

---

<sup>301</sup> Unreported, SC Vic, 14 Dec 1994 at 150a – 151a.

<sup>302</sup> Unreported, SC Vic, 14 Dec 1994 at 154. See also *Simington and Saunders*, unreported, SC NSW, 4 Nov 1988; *Whalen*, unreported, CCA NSW, 5 Apr 1991; *Bobach*, unreported, SC NSW, 1 Nov 1988.

<sup>303</sup> For example in *Penn*, unreported, CCA Vic, 9 May 1994, the Victorian Court of Criminal Appeal expressed the view that '[i]t cannot be ... that a sentencing judge should be required to impose a harsher penalty upon an offender who causes the death of a person who is widely loved than upon one who causes the death of an unloved victim' at 6. See also *Inkson* (1996) 6 Tas R 1.

delicate process, my view is that it can be done without infringing the rules that limit the 'facts' to which a judge can properly have regard in the sentencing process.<sup>305</sup>

In the exercise of the sentencing discretion, there is no doubt as to the legitimacy of a judge having regard to the accused's motive or reasons for action. As Norrie observes, 'the questions of motive and the ensuing moral judgments of right and wrong re-emerge at the sentencing stage from the purdah which the law imposes upon them'.<sup>306</sup> The judge's responsibility for determining issues of motive was recently confirmed by the High Court in the decision of *Cheung*.<sup>307</sup> In the context of murder and manslaughter, the determination of questions of motive by the sentencing judge is not inconsistent with the jury's verdict of guilty or the accused's plea of guilty.<sup>308</sup> In sentencing battered women who kill, my contention is that judges should acknowledge the lesser culpability that attaches by reason of the accused's fear/motive of self-preservation as a result of her partner's violence. Commentators have observed the legitimacy of self-protection as a mitigating factor in the imposition of sentence.<sup>309</sup> This approach does not view the history of violence through the filtered lens of the accused's (abnormal) psychology. Rather, the history of violence provides a rational basis for accepting the accused's explanation as to the reason for her actions. In this way, the violence is directly related to the reduction of the accused's culpability.

Judicial recognition of the mitigatory effect of domestic violence and the accused's motive does not necessarily involve an assessment of the value of the deceased's life or human life generally. In calling for domestic violence to be directly acknowledged, I am not suggesting that courts condemn the deceased as a 'bad man' who 'deserved to die'. The approach to sentencing battered women who kill that I am advocating does not deny that human life is a special thing,

---

<sup>304</sup> Unreported, SC NSW, 21 Mar 1996 at 33.

<sup>305</sup> See 8.2.1.

<sup>306</sup> A Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*, London: Weidenfeld and Nicolson, 1993 at 46. Although the flexibility of the distinction between motive and intention was considered at 3.3 and 4.4.2.3.

<sup>307</sup> *Cheung* [2001] HCA 67 at [4] – [20] per Gleeson CJ, Gummow and Hayne JJ.

<sup>308</sup> See *Cheung* [2001] HCA 67 at [9] – [10] per Gleeson CJ, Gummow and Hayne JJ.

and something that should be valued. I am not suggesting that a deceased's life was without value by virtue of his violence or that the accused's entitlement to life was greater than the deceased's. However, my contention is that there should be recognition of the value that the accused is entitled to place on her own life. The relevance of domestic violence is not to devalue his life but to reduce her culpability by reducing the objective gravity of the offence and rendering the accused's motive (her reason for acting) less blameworthy.<sup>310</sup>

While a sentencing judge cannot sentence on the basis that the accused's actions conformed to the current requirements of self-defence, there is room for judges to make statements about the gendered nature of the accepted model of self-defence. These statements have been absent in the Australian jurisprudence to date.<sup>311</sup> The recognition of the accused's motivation of self-preservation and fear means that legitimacy (within the criminal justice system) is being given to the accused's motivation. This recognition could be accompanied by statements that reveal an awareness of the literature that has demonstrated the gendered origins of the law of self-defence and the standard of reasonableness. In acknowledging that the accused's actions do not conform to the current standard of 'reasonable self-defence', comment could be made that this may owe more to the gendered nature of the paradigm of reasonable self-defence than to the inherent unreasonableness of the accused's perceptions of the need to defend herself.

## 8.5 CONCLUSION

This chapter has shown the wide range of sentences imposed on female offenders who killed their male partner. In sentencing for murder, the sentences imposed ranged from the imposition of a penalty of life imprisonment to a term of imprisonment for a minimum of five years with an additional term of four years. In sentencing for manslaughter, the sentences imposed ranged from the

<sup>309</sup> C Ruby, *Sentencing*, 5th ed, Toronto: Butterworths, 1999 at 665 - 666 referring to *O'Neill* (1966) 51 Cr App R 241; *Simonson* (1982) 43 NBR (2d) 617.

<sup>310</sup> This reflects the concept of agent-relative permission which I contend forms the theoretical basis for self-defence in Australia, see Chapter Four.

<sup>311</sup> See Chapter Six. See also J Stubbs & J Tolmie, 'Falling Short of the Challenge?', above n 248 at 722.

imposition of a non-custodial sentence to a head sentence of 12 years with a non-parole period of eight years. While the interaction of many variables makes it difficult to analyse the sentencing discretion, the central approach I identified in the imposition of lighter sentences on battered women who kill was that of mercy and sympathy. This was apparent in the sentencing narratives, as well as in the sentences actually imposed. The median sentence for manslaughter was 3 years and 10 months and non-custodial sentences were imposed in 16 of the 55 cases where women were convicted of manslaughter.

In the exercise of the sentencing discretion in cases where women kill their violent partners, my analysis has highlighted three main difficulties associated with the current approach. First, in positioning battered women's claim to leniency in terms of mercy, they are placed outside the usual mitigatory framework – their claim is for compassion when severity would usually be warranted. This means that mercy is only offered to women who conform to the stereotype of the appropriate victim – pathological, domestic and irrational. Secondly, there has been a failure clearly to differentiate between responses to domestic violence which are violent (and domestic in this sense) and 'domestic violence' properly called, that is the use of violence as a means of maintaining power and control. The woman's violent response is viewed as part of the 'domestic violence' problem and must be condemned accordingly. This enables the court to make strong statements about the sanctity of human life and the seriousness of the accused's actions, and then impose a non-custodial sentence in cases deemed to be 'exceptional'. The woman is compensated for her difficult life, rather than directly acknowledging the seriousness of domestic violence as providing a rational motive for her action. In these circumstances, reliance on the concept of mercy sustains the judicial system's willingness to express sympathy and compassion for battered women, while not recognising the legitimacy of their actions.

Thirdly, while there is evidence that judges are sympathetic towards many women's difficult situation, and are, in some cases, imposing lenient sentences, the existence of a history of violence is not treated consistently. As my consideration of the 'exceptional case' shows, instead of acknowledging the

history of violence as a relevant mitigatory factor, the accused's conformity with the stereotype of the appropriate victim (pathological, a good mother and irrational) is the focus of the judicial inquiry. Women's pathology as the basis for a claim for sympathy and leniency is also seen in the provocation cases where non-custodial sentences are imposed. There has been a failure to unambiguously recognise that domestic violence is 'grave' provocation, and holding that mitigation is warranted on that ground. Instead, the focus of the judicial approach to sentencing appears to be the impact of the violence on the accused's psychology. This approach means that there is still a failure to recognise unambiguously the serious and potentially fatal nature of the violence that women face in their home – the assaults, threats and sexual attacks.

On the basis of the deficiencies that I have identified in the current approach to sentencing battered women who kill, I have advocated two main changes. First, in order to facilitate reliance on self-defence at trial, I have argued for the abolition of mandatory sentencing for murder. I have also illustrated the potential injustice that may arise from the sentencing discount for a guilty plea that acts as a further disincentive to rely on self-defence at trial. Secondly, I have advocated the recognition of the history of violence as the motivating factor for the woman's actions. In sentencing battered women who kill, the current judicial approach relies upon the familiar language of appropriate femininity: psychology, domesticity and inability to act. This fails to recognise the rationality of the accused's motive (her reason) for the use of violence, and an appreciation of the rationality of battered women's conduct is a condition precedent to acceptance that women who kill their violent partners may be acting in reasonable self-defence.<sup>312</sup>

---

<sup>312</sup> See 6.3.3.2.